

Pages 1 - 107

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

United States of America,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CR 08-0222 WHA
	)	
Luke Brugnara,	)	
	)	San Francisco, California
Defendant.	)	Monday
	)	May 24, 2010
	)	10:06 a.m.

# TRANSCRIPT OF PROCEEDINGS

**APPEARANCES :**

<b>For Plaintiff</b>	U. S. Attorney's Office 450 Golden Gate Avenue, 9th Floor San Francisco, CA 94102 (415) 436-6888 (415) 436-6748
<b>BY:</b>	<b>THOMAS NEWMAN</b>

**For Defendant** Brian H. Getz  
44 Montgomery Street, Suite 3850  
San Francisco, California 94104  
(415) 912-5886  
**BY: BRIAN H. GETZ**

Reported by:	Lydia Zinn, CSR #9223, RPR, CRR Official Reporter - U.S.D.C.
--------------	---

1           **THE COURT:** All right. Welcome, everyone. Please  
2 have a seat.

3           **THE CLERK:** Criminal Number C.R. 08-222,  
4 United States versus Luke Brugnara.

5           Counsel, please state your appearances.

6           **MR. NEWMAN:** Good morning, your Honor. Tom Newman,  
7 on behalf the United States.

8           **MR. GETZ:** Brian Getz, for Luke Brugnara, in custody.

9           **MS. SEARLES:** Good morning, your Honor. Ann Searles,  
10 on behalf of the U.S. Probation Office.

11          **THE COURT:** All right. Welcome to everyone.

12          **MR. GETZ:** Your Honor, Mr. Brugnara is present before  
13 the Court.

14          **THE COURT:** All right. Mr. Brugnara, welcome back.

15          We're here for sentencing after a plea of guilty.

16          Mr. Brugnara, did you read the presentence report?

17          **THE DEFENDANT:** Yes, your Honor. And I have a letter  
18 here that -- you know, I've been in solitary confinement over  
19 at the Oakland Jail; been unable to have access to a phone or,  
20 for that matter, even a shower, though maybe twice a week. I  
21 don't know if you were aware of that, but I've been unable to  
22 communicate with anybody.

23               I wrote a letter to you last Thursday that I'd like  
24 to hand to you. And it pretty much explains about last week.  
25 There was a series of filings that were filed in your court.

1 Do you see that?

2 **THE COURT:** I did.

3 **THE DEFENDANT:** Would you like me to read this  
4 letter, or would you like me to hand it to you?

5 **THE COURT:** I don't think that's necessary. That has  
6 to do with -- release out of custody on O.R. is what you were  
7 requesting, correct?

8 **THE DEFENDANT:** No. This letter basically explains  
9 what led up to the filing of those motions in your -- in your  
10 court. I'd like to read it, if I may, or I can hand it to you;  
11 whatever you prefer.

12 **THE COURT:** Just hand it to me, please.  
13 (Whereupon a document was tendered to the Court)

14 **THE DEFENDANT:** And these exhibits, please.  
15 (Whereupon a document was tendered to the Court)

16 **THE COURT:** All right. Mr. Getz, have you seen  
17 these?

18 **MR. GETZ:** No, I haven't, but I'm aware that  
19 Mr. Brugnara feels the record is woefully inadequate with  
20 regard to the request for the evidentiary hearing pertaining to  
21 the tax loss.

22 **THE COURT:** All right. The letter begins,  
23 "Dear Judge Alsup, This letter shall  
24 affirm that Brian Getz was released as my  
25 attorney a week and a half ago because he

1           has had no communication with me for weeks,  
2           and did not file the required declarations  
3           and motions."

4           It goes on in that vein. And then later on, he asks  
5 for relief -- O.R. relief.

6           **THE DEFENDANT:** Your Honor.

7           **THE CLERK:** That was this prior he sent in  
8 (indicating).

9           **THE COURT:** All right. Just to be -- there's a prior  
10 letter here.

11           There was a separate letter that was asking for O.R.  
12 relief. So there are two separate letters. The one dated  
13 May 17 is the O.R. one. May 21 is the one about the tax point.

14           **THE DEFENDANT:** Your Honor, I had the opportunity to  
15 speak to Mr. Getz for the first time in a considerable period  
16 of time, before court began. And I believe we've made some  
17 headway on his concurrence with my opinion on tax loss, which  
18 is -- as you know, has remained constant for two years; that  
19 there is no tax loss, irrespective of the plea. As you know,  
20 the plea is completely separate from the tax-loss issue.

21           And, in fact, when the plea was taken into your  
22 court, you had indicated to me you would allow me to speak  
23 freely about whatever I wanted to, especially a tax loss,  
24 because I was concerned at that time that the U.S. Attorneys  
25 might, in fact, try to increase that number, even though I said

1 that they had been straight shooters for two years, and I  
2 didn't expect it; but well, to no great surprise, they  
3 increased the number 800 percent. And, your Honor, I know  
4 you're a mathematician. An 800 percent increase from what was  
5 the number for one year from May of 2009 through January 26,  
6 2010, they took it up from \$300,000 up to 2-million-4.

7 And you know what? If that was in the civil world,  
8 in business, that person would be shown the door for bait and  
9 switch. They'd be sued. They might even have a criminal  
10 action brought against them, because that's just not done.

11 I've done business at the highest level for 17 years.  
12 And if there's a contingency issue, it might be 5 percent. It  
13 might be 10 percent. Heck, it might be 20 percent. It's not  
14 800 percent.

15 So it's not a great surprise that they modified that  
16 number after I was taken into custody, your Honor.

17 Your Honor, I was on O.R. release for two years, as  
18 you know, in this court and in Judge Chesney's court.

19 And I was taken into custody based on a false claim  
20 of threat that wasn't even able to produce an indictment. That  
21 was refuted in Judge Chesney's court by, apparently, one of the  
22 parties that had -- it came from. And it was, in fact, deemed  
23 a false threat. It wasn't even worthy of getting an  
24 indictment.

25 And from that, unfortunately, came out this plea.

1           As you know, I have maintained my position of  
2 innocence for two years in both the cases.

3           And, because of the circumstances, how sick I got in  
4 the custody not of myself or of family members, but in the care  
5 and custody of that jail -- I got deathly ill. And that is  
6 fact. And nobody's refuted that fact. I told the Pretrial  
7 Services Officer, Rich Sarlatte, first time I spoke to him. I  
8 phoned my medical doctor the second I got out of that jail. I  
9 lost ten pounds in four days. Your Honor, I put that in a  
10 revised declaration.

11           And I also put it in a revised declaration to you on  
12 the motion for reconsideration of plea withdrawal, which you  
13 have not ruled on yet, which would make this hearing today  
14 moot.

15           Details about Harris Taback's ineffectiveness as  
16 counsel, which -- in your ruling, you were very specific that  
17 you couldn't rule upon those issues, because it wasn't  
18 presented in the form of a declaration or sworn testimony by me  
19 at the request for motion for withdrawal of the plea.

20           So the filing for reconsideration of the motion for  
21 withdrawal of the plea included a very detailed explanation of  
22 what occurred between November 3rd, when I stood here with  
23 Mr. Taback and told you that he was great, and that I loved  
24 him -- as you probably remember that conversation, too.  
25 Harris Taback is an amenable fellow. And up to that point, I

1 had no reason to believe that he wouldn't do a good job. He  
2 had been paid up to that point \$67,000.

3 Well, Harris Taback went on to tell you,  
4 your Honor -- and he also said the same thing in  
5 Judge Chesney's court the next day -- he needed more money. He  
6 needed more money for private investigators, and he needed more  
7 money for expert witnesses: The two critical things he needed  
8 for the trial.

9 And you said to me, "Hey, Mr. Brugnara, I don't know  
10 about you, but if I were you, I would get him that money,  
11 because I don't want you coming here saying that, hey, after  
12 the fact, 'We weren't prepared at trial because'" -- and you  
13 can read this in your own -- your own transcripts; that -- that  
14 Harris Taback didn't have the money to pay for these private  
15 investigators and expert witnesses.

16 More interestingly, in Judge Chesney's court the very  
17 next day, he made the same plea to Judge Chesney, and actually  
18 was much more specific; said, "I need \$7,000." Gave her an  
19 actual numerical amount -- \$7,000 -- for expert witnesses and  
20 for private investigators to review the defense witnesses that  
21 they had proposed. So we had a specific number in front of  
22 Judge Chesney. I believe he said it was around \$10,000.

23 Well, your Honor, I didn't speak to Harris Taback for  
24 two months, from November 3rd to January 3rd. I tried to reach  
25 him. I tried phone him. I tried to contact him. He wanted

1 nothing to do with me.

2           So, from this love fest that was prior to  
3 November 3rd, when he told you he was no longer going to work  
4 on the case anymore -- he said, "I'm not working in this case  
5 anymore," in so many words, to you.

6           And you said, "Well, listen. Has he done a good job  
7 up to that date?"

8           I said, "Absolutely." I was shocked. I thought it  
9 was grandstanding on his part. I thought it was a way that he  
10 was going to try to, you know, strong-arm the Court into, you  
11 know, letting him be released. I have known Taback for nine  
12 years. I never expected that Harris Taback would not take my  
13 calls --

14           Can I have a sip of water?

15           -- but he didn't. And it went on for two months. So  
16 I finally contacted -- and this is in my declaration,  
17 your Honor, or you can take my sworn testimony, if you want,  
18 right now. It's in my declaration. When I told him I had the  
19 money for -- I -- I got a call back in five minutes. Five  
20 minutes.

21           And he said, "Okay. I'll see you tomorrow."

22           Went down to his office. I said, "Here's the money  
23 for the expert witnesses. Here's the money for the private  
24 investigator." Now it's up to \$29,000. Because he was 67, I  
25 gave him \$25,000. And I said, "This is what you said you



1 needed for Judge Chesney and Judge Alsup. Here it is." And  
2 you've got to remember that the court date's in two weeks.  
3 That's a big chunk of money to give to him for these private  
4 investigators. It covered the full amount due for the  
5 investigation and the expert witnesses.

6 Well, guess what. Harris Taback didn't spend a penny  
7 of that \$25,000 on expert witnesses or private investigators.  
8 And that's huge, because he lied to the Court. He represented  
9 to you and to Judge Chesney in court on the transcript, "I need  
10 \$7,000, your Honor, to represent my client, Luke Brugnara, and  
11 to do the best job that I'm required to do under, you know, the  
12 federal court system. I need \$7,000."

13 Now, that's a lie, because he never intended on  
14 taking that money and using it for my benefit, because I paid  
15 it to him -- or maybe it wasn't -- I don't know, but the fact  
16 is he didn't have any expert witnesses and he didn't have any  
17 investigation done.

18 I gave Harris Taback, your Honor -- and this is in my  
19 declaration; the supplemental declaration -- a list of 20  
20 witnesses to contact: Ten for your case, a ten for the fish  
21 case.

22 I said, "Harris, here's the money."

23 And, your Honor, you know me after two years. I'm a  
24 frugal businessman. You know, I have to run things; pay my  
25 lenders. So I'm very thorough. I said, "Here's the money."

1 I gave him a typed-out list, printed out from a  
2 computer. Here's ten witnesses in each case. These are my  
3 witnesses that will defend my position in the tax case. It was  
4 my brokers. It was my lenders. It was my witnesses that --  
5 that would promote my position.

6 And in the fish case, it was conservationists. You  
7 have to understand that I've been a fly caster -- an accuracy  
8 fly caster -- my entire life, since I was ten years old. I  
9 actually was involved in fish-conservation efforts from the  
10 time I've been a child, actually, helping streams. And I  
11 had --

12 **THE COURT:** But this is -- you're not helping  
13 matters, getting off into any of the --

14 **THE DEFENDANT:** Okay. I won't get off, but the  
15 specifics is: Taback didn't spend any money on it.

16 So we came to trial.

17 And the other thing is very important. The  
18 psychiatrist's report that was basically going to be used to  
19 impeach that I was out of my mind. And I never held a position  
20 that I was mentally ill. I'm not, and I never have been; but I  
21 was so physically sick and ill on that day, this -- I certainly  
22 wasn't of sound mind. I had a fever. I had chills. I had  
23 diarrhea. And, your Honor, you know, if you're sick, you don't  
24 come to work. If you're sick, you don't go to school. I have  
25 four school-aged children. They're kept home for a reason; not

1 just because they'll get other people sick; because they can't  
2 function at the level they need to. I was sick.

3           Notwithstanding that fact, I said, on this  
4 eavesdropped telephone conversation that was put into your  
5 record, because you made the Kessler psychiatrist's report part  
6 of your record, that -- I said to my mother, "I have no  
7 confidence in Taback. He's not prepared at all. And I'm  
8 innocent of the charges."

9           And God bless Dr. Kessler for putting that in his  
10 report, because I think he put it in his report for a reason,  
11 to let the Court know: Here's Luke Brugnara, telling his  
12 mother, literally hours before your plea, "I am innocent. I  
13 have no confidence in Harris Taback, and he's unprepared."

14           I made the same phone call to my wife. And I  
15 reiterated the same things: I have no confidence in  
16 Harris Taback; he's unprepared; I'm going to represent myself;  
17 and I'm innocent.

18           And this was an eavesdropped, recorded telephone  
19 conversation; the most honest source of information you could  
20 probably get. It's an eavesdropped call that was recorded,  
21 unbeknownst to me. And here it is now, of the record.

22           Now, the threshold in the Ninth Circuit, as you had  
23 indicated, is a liberal threshold. Again, I'm not an attorney.

24           **THE COURT:** I let you take back your guilty plea  
25 once.

1           **THE DEFENDANT:** I understand that, your Honor.

2           **THE COURT:** Now you want to do it twice.

3           **THE DEFENDANT:** You know what, your Honor. You know  
4 what, your Honor. I'm going to tell you something, with all  
5 respect for you.

6           **MR. GETZ:** Don't.

7           **THE DEFENDANT:** No, no.

8           I apologize for that, your Honor.

9           I've been locked down.

10           I respect you. In fact, if I listen to some of the  
11 other eavesdropped conversations, because they've saved all of  
12 them, I talk about my respect for you, and how fair you are;  
13 about your appointment; who appointed you; where you're from,  
14 and who you are.

15           I believe there are judges that do what the  
16 U. S. Attorneys tell them. I do not believe you're that  
17 person.

18           I think you rule fairly and justly. And I'll tell  
19 you it's somewhat of an embarrassment, in a way, for me to ask  
20 you, in your position, to withdraw this plea, your Honor,  
21 because how could a man who has done a billion dollars' of  
22 deals, who's making decisions like this without partners for 17  
23 years, a father of four children, go plead guilty?

24           **THE COURT:** Twice.

25           **THE DEFENDANT:** Twice.

1           And that -- but you know what, your Honor. The first  
2 time that it happened, I think we all know, that was basically  
3 on very serious negotiations between the U. S. Attorneys and  
4 Hallinan & Wine. And that was carefully drafted as a protected  
5 plea. And it was a pretty darn good deal. Like you said, it  
6 was in relation to whatever the charges were; but the problem  
7 was that as soon as it was done, I said to my attorney, "You  
8 know, I'm innocent."

9           And one other thing. Pat Hallinan had a stroke that  
10 week. He actually had an operation. He had a blood clot.

11           I told him. I said, "You know, I'm innocent, though.  
12 I just can't accept this, because -- because even though there  
13 may be this 2-, \$300,000, oh, it was done unintentionally. It  
14 was calculated from an Alternative Minimum Tax." That's what I  
15 put on my spreadsheet, even though my spreadsheet shows zero,  
16 your Honor. When you calculate in ATM [sic], the number comes  
17 into that same number. My spreadsheet shows zero, which ends  
18 up being around 300 grand. It's the same number that Hallinan  
19 & Wine had. It's the same number that they had up for the last  
20 year. So probably 300 grand is owed.

21           But in the Harris Taback situation, I'm going to tell  
22 you something, your Honor. I am not used to be being in jail.  
23 You know, I'm in my mid forties. I've never been to jail. And  
24 it was -- you know, I mean -- I mean, it's like taking a lamb  
25 and putting it into a lion's den. I'm just going to tell you

1 something. You know, I mean, I know you deal with people all  
2 the time. That's not an excuse, you know; but from a practical  
3 standpoint, you know, getting -- plus when I get sick, anyone  
4 will tell you when I -- the world is blah when I'm sick. It  
5 could be the flu. You know, my children have more strength  
6 than me when I have the flu. I'm, like, oh, my God, I'm sick.  
7 Me being sick coupled with me being in that environment was a  
8 horrific circumstance for me to come in and, you know, begin  
9 this trial in Judge Chesney's court.

10           And then Harris Taback was the final nail in my  
11 coffin. And that was the main basis for our application to  
12 withdraw the plea, because you know, subjectively, you could  
13 say, "Well, how do I know how sick you were? Did you get a  
14 temperature taken?"

15           But what's not subjective was Harris Taback's  
16 representations to you in open court in November, asking you  
17 for a specific dollar amount, asking Judge Chesney for a  
18 specific dollar amount for expert witnesses, for private  
19 investigators to benefit his client; and then deceiving you and  
20 deceiving Judge Chesney, and getting that money; not working on  
21 my case, to the point where I'm basically telling my mother and  
22 my wife, hours before the plea, "Listen. Listen. You know, I  
23 can't have this guy represent me anymore. I'm just going to  
24 represent myself." I'm -- everyone knows only a crazy person  
25 represents themselves.

1           He's not prepared. He didn't know the name of the  
2 witnesses, for goodness' sake, for the prosecution. So I'm  
3 just --

4           And then, of course, Harris Taback, as soon as he  
5 sees the opportunity, he guides me into this plea. I mean,  
6 he's so excited, your Honor. And I know it's not grounds for  
7 withdrawing the plea, but he doesn't see the big, bold print on  
8 the application, "Must be in defendant's handwriting." He's  
9 doing cartwheels to get this thing off his plate.

10           A. He's not a trial attorney.

11           B. He doesn't want to go to trial.

12           He told you, himself, "I don't want to go to trial."  
13 He wasn't even prepared. He wasn't prepared for the trial, so  
14 he uses that to get out of the trial, to my detriment.

15           And you could just look at the plea. I mean, there  
16 is no benefit to me. If it was like a Hallinan & Wine plea --  
17 say, "Well, listen. Look. You know, this is pretty close to a  
18 Hallinan & Wine plea. It's a pretty good deal."

19           It's not a good deal. It's a horrible deal.

20           **THE COURT:** You're repeating yourself, and I cannot  
21 give you this length of time.

22           **THE DEFENDANT:** I'll cut it short, your Honor.

23           So the short of it is that he didn't even attempt to  
24 get me released from the Oakland Jail by even finding out who  
25 made this purported claim against me which resulted in the

1 arrest.

2 In fact, I had to hire Edwin Prather. And  
3 Edwin Prather was hired. And he went out, in a matter of a  
4 day, and found out the threat came from a felon, a drunk, a  
5 person who had a vendetta against me, who was kicked off my  
6 property for cutting down ancient oak trees ten years earlier.  
7 Never spoke to me again. He was an in-law. And he begrudged  
8 me -- this person. And he made up this false claim,  
9 third-person removed, that he heard from somebody who heard  
10 from somebody else who heard from somebody else that I  
11 threatened him, which was a complete fabrication. Of course,  
12 it was defused, and proven to be a lie. This is one thing that  
13 isn't important.

14 **THE COURT:** This presentence report is full of  
15 instances where you have threatened people with physical  
16 violence.

17 **THE DEFENDANT:** Well, your Honor, let me tell you.

18 **THE COURT:** So if that other story was made up, then  
19 it's in good company, because this --

20 **THE DEFENDANT:** Well --

21 **THE COURT:** You have made a career of bullying  
22 people, and physically threatening them.

23 Now, that's not what you pled guilty to; but for you  
24 to say that this was a totally made-up story that you --

25 **THE DEFENDANT:** Well, your Honor, let me tell you.



1 First, if you look at this -- people that make these  
2 allegations -- let's start off by saying how many people I've  
3 dealt with in the last 17 years, and the amount of value of  
4 business in a corner grocery store. I've dealt with probably  
5 10,000 tenants, professionals, contractors. You're talking  
6 about 2 million square feet, 17 high-rise office buildings and  
7 shopping centers. I've dealt with tens of thousands -- not  
8 tens -- probably 10,000 people.

9 There's a handful of people ten years ago. And it  
10 was all in a concentrated period of time, your Honor, because  
11 there was an article that came out on me in the *San Francisco*  
12 *Weekly* that alleged I had threatened somebody. And all of the  
13 people that wanted to try to shake me down and try to get some  
14 sort of leverage on me in any position said, "Oh, well, he did  
15 that to me, too."

16 There haven't been any allegations of threats in ten  
17 years, your Honor. There haven't been any allegations of  
18 threats in ten years: A decade. And I -- and I'm very careful  
19 about and I've learned my lesson about even dealing with  
20 people, unless there are other people around.

21 My attorneys advised me there's a reason why you need  
22 to have company with you at all times in business: So people  
23 don't make up false claims about you.

24 And these were false claims. The bulk of the claims  
25 came from a woman who shook me down for a million-dollar claim.

1 And my attorney and I had actually sued for a blood  
2 test. We actually had to sue her for a blood test, to prove  
3 that the child was not mine. And, of course, she disappeared  
4 and crawled back under the rock that she came out of when it  
5 came time to take the blood test.

6 So, you know, I mean, you have to look at each one on  
7 its own merit. And the fact that there haven't been any claims  
8 of any threats in ten years, you know, your Honor, I ask that  
9 you set aside this plea and let me go to trial, your Honor.  
10 You -- this tax case deserves a trial. And it will prove, in  
11 my opinion, at the end of the trial, that I probably owe  
12 between 250- and \$300,000 on Alternative Minimum Tax.

13 And I think it will also prove that that number was  
14 because I didn't know what I was doing, because I still don't  
15 know today how to calculate Alternative Minimum Tax, or I would  
16 have put it on the graph. I would have been found innocent.  
17 That's how your trial, in my opinion, will end.

18 If you allow this to go to trial, I will be found  
19 innocent, and I will be fined, oh, \$300,000 now, in the  
20 interests of justice.

21 **THE COURT:** One more sentence, and then --

22 You've been going on now for 30 minutes.

23 **THE DEFENDANT:** Well, your Honor, 30 minutes.

24 **THE COURT:** You can make -- I'm going to let you  
25 speak more later, but I need to hear from the other side.

1 This long statement that you're making --

2 **THE DEFENDANT:** Well, your Honor, I believe there are  
3 sufficient grounds under the Ninth Circuit standard, the  
4 liberal standard, of setting aside a plea prior to -- prior to  
5 sentencing. There's not a limit on the number of times a plea  
6 can be withdrawn, or it would be in the -- in the Federal Code.  
7 It would say, "You can only do it once." There is no limit.  
8 You can do it ten times, if there's ten fair and just reasons;  
9 but I'm asking you to do it for a fair and just reason of  
10 ineffective counsel, who did not spend the money that he was  
11 given that he represented to the Court that he would use for my  
12 benefit, for investigative services for the trial and for the  
13 expert witnesses. And he represented not only to you but in  
14 Judge Chesney's that he would do that, and lied to both of you,  
15 to my detriment. That, alone, is grounds for his being  
16 ineffective.

17 The eavesdrop conversations confirm this: Even hours  
18 before the trial, he wasn't prepared. The fact of how he  
19 guided me into a plea that provided no benefits was the final  
20 proof; but I request that you set aside the plea. I'm not  
21 asking you to dismiss the case.

22 There's judges in the Ninth Circuit. Judge Jones in  
23 Las Vegas actually dismissed a federal tax case because he said  
24 it didn't involve illegal source of funds, and he felt in the  
25 Ninth Circuit that only illegal sources of funds should be a

1 criminal tax case, and that the balance should be in U.S. tax  
2 court.

3 I'm not asking you to dismiss the case. I'm simply  
4 asking: Please let me go to trial. I'm not asking for any  
5 extension of time. You could set it for next week. I'll go.  
6 This isn't any stall or delay. Let me go to trial. Set your  
7 first calendar date, the first speedy-trial date you have. And  
8 if the Government believes they have a case against me, let  
9 them prove it. Do it the old-fashioned way, the American way,  
10 the way of the Constitution. Let them prove that I'm guilty.  
11 Let them prove it, because you know what.

12 **THE COURT:** All right. You're making a speech.

13 **THE DEFENDANT:** Your Honor, I'm not asking for any  
14 extensions. Set my trial next week. Let them prove their  
15 case.

16 **THE COURT:** But you know in the meantime, the Court's  
17 calendar has been taken up.

18 It sounds fine for you to say that, but we have  
19 relied upon your plea of guilty, and made other arrangements,  
20 and so the calendar is filled up. The Government has released  
21 its witnesses. It would take a long time to get the case  
22 reset. So that's not as easy as just saying, "Let's go to  
23 trial next week."

24 What does the Government say on the motion for  
25 withdrawal of plea?

1           **MR. NEWMAN:** That it should be denied, your Honor.

2           The defendant is bringing up the same reason as he  
3 did before. A motion for reconsideration is not brought to  
4 relitigate already decided matters. He's not bringing up new  
5 facts; no new legal grounds.

6           Whatever illness he had, it's not mind altering.  
7 There's already a conclusion by his psychiatrist that he knew  
8 exactly what he was doing on January 26th when he pled guilty.

9           There's no indication that Harris Taback's advice  
10 gave any kind of consideration into this. The defendant  
11 testified to your Honor and to Judge Chesney that this was all  
12 his idea. So there isn't any reason to assume at all that  
13 Harris Taback, even if he gave bad advice -- and that's not  
14 what the testimony is -- that it made him make a bad decision.

15           And as to the defendant's now pleas of innocence, I  
16 would say that he testified twice now under oath as to the  
17 factual elements to a very basic crime of signing a false  
18 income tax return willfully, just meaning that he knew that he  
19 had to include, in essence, the inclusion of the sales of these  
20 buildings on each of the tax returns; one for each year. And  
21 for the first one, two buildings were sold.

22           The Government made a proffer. Consistent with the  
23 proffer, the Government introduced two declarations from the  
24 defendant's accountants. The accountants confirm everything  
25 that the Government proffered, including --

1           **THE COURT:** This is on which, please?

2           **MR. NEWMAN:** Sorry. For the second one, your Honor.  
3 For the second plea, the Government made a proffer.

4           **THE COURT:** This was before the plea was taken.

5           **MR. NEWMAN:** It was before the plea was taken.

6           The defendant hired two accountants in Las Vegas, or  
7 two accountants at the same firm. They asked him repeatedly,  
8 "How much did you sell the buildings for" as to Count One,  
9 Count Two, and Count Three; specifically, the sale of the  
10 Post Street property, the sale of the Market Street property,  
11 and the Mission Street property.

12           The defendant repeatedly replied to them in writing  
13 how much he bought the buildings for, how much he sold them  
14 for, and how much tax he thought was due.

15           And I filed these declarations twice; the second  
16 time, with the Government's sentencing memo.

17           The defendant gave them written confirmation that he  
18 believed he owed \$2.5 million of tax on the sale of the  
19 490 Post Street. That was contemporaneous when that income tax  
20 return would be due -- or not that one; that would be for when  
21 the 2001 -- 2000 return would be prepared in 2001. At that  
22 time, he was telling them he sold that property. They were  
23 asking him for the specific purpose of putting it on his tax  
24 returns. That's what their question was: What is the sale to  
25 include on your tax returns?

1 He replied the same is true of the 814 Mission Street  
2 property. He asked them. The accountants asked, "What did you  
3 sell it for? And how much do you expect to owe?"

4 And he replied, "\$1.96 million of tax."

5 In March of 2001, when the tax return in Count One  
6 would have been prepared -- it was due a month later. He  
7 didn't include the sale at all. These questions and answers --

8 **THE COURT:** Did he prepare -- did he sign that  
9 return?

10 **MR. NEWMAN:** Yes, he did. And he testified that he  
11 signed all of these returns, and omitted all of these sales.

12 **THE DEFENDANT:** Your Honor.

13 **THE COURT:** Wait, wait, wait.

14 So, in the Government's view, not that you don't have  
15 other strong points, but what would be the most irrefutable, in  
16 your view, tax-fraud point that the defendant is guilty of, and  
17 that you could show if this case had ever gone to trial?

18 **MR. NEWMAN:** I have the declarations, your Honor.  
19 And I have them here. It's just that --

20 **THE COURT:** Just summarize it, for the record.

21 **MR. NEWMAN:** Well, that he specifically told his  
22 accountants,

23 **"QUESTION:** What buildings did you sell this  
24 year, and for what amount?"

25 And paragraph three of Bill Nelson's declaration is that

1 he asked exactly,

2 "Give me the estimated net income and  
3 loss for 2000 that will be reported on your  
4 tax returns."

5 And in the same fax, he wanted the estimate; the net  
6 income or loss that would be reported on your 2001 tax return,  
7 including the sale of 490 Post.

8 The defendant replied to that fax that was dated  
9 February 28th, 2001, by a fax on March 1st. The defendant  
10 responded by stating his estimated net income and loss for  
11 2001 -- that will be including the sale of 490 Post -- is an  
12 estimated \$12.5 million of gain; and then estimated  
13 \$2.5 million of tax on that sale.

14 **THE DEFENDANT:** Yeah.

15 **MR. NEWMAN:** He also included the sale of  
16 814 Mission Street, and \$2.4 million of gain on that sale, and  
17 the sale of 939 Market Street.

18 The defendant went on to say that the gain was  
19 \$9.6 million; an estimated \$1.96 million of tax.

20 They asked these questions over again. And, in  
21 paragraph six of the Nelson declaration, the defendant again  
22 provided the basis for the properties, the amount he bought  
23 them for, and the amount of realized gain, and included the  
24 amount of tax that he thought he would owe that year. And, in  
25 fact, he didn't report the sales at all.



1           The accountants went on to tell him that he is  
2 required to report either the sale or the exchange of any  
3 property that he owns, whether or not he realized any gains on  
4 any of these properties.

5           And Mr. Crowther's declaration --

6           **THE COURT:** Let me ask this, Mr. Newman, just for the  
7 sake of argument. If the amount of the tax loss was \$300,000,  
8 what would be the sentencing range? And how would that affect  
9 the -- how would that affect our numbers?

10          **MR. NEWMAN:** If it was 300-, I think it would be 46  
11 to 57 months.

12          **THE COURT:** I'm sorry. Show me. Where do we have  
13 the loss number in the computation? That would be in paragraph  
14 39?

15          **MR. NEWMAN:** Talking about 39 of what, your Honor?

16          **THE COURT:** Of the Presentence Report.

17          **MR. NEWMAN:** Oh. The loss amount. Your Honor, since  
18 that time, if I could explain that -- are you -- it is 2.4.

19          **THE COURT:** I'm looking at the PSR, paragraph 39.

20          **MR. GETZ:** The answer to the Court's question is  
21 "Yes." It's paragraph 39. There's a different loss number,  
22 but it would not affect the number 22 in paragraph 39, because  
23 the range is big enough to include both numbers; but I think  
24 what the Court's asking is whether the number -- were the  
25 number to be 300,000, where does it go down from 22?

1           **THE COURT:** That's what I'm asking.

2           **MR. NEWMAN:** Mm-hm.

3           **THE DEFENDANT:** Your Honor, could I have some water?  
4 They won't give me any water.

5           **THE COURT:** Marshals, give the defendant some water.

6           **MR. NEWMAN:** Yeah. That -- it would be 37 to 47  
7 months.

8           **THE COURT:** Thirty-seven to forty-six. Is that  
9 agreed, Mr. Getz?

10          **MR. NEWMAN:** Yes. Yeah.

11          **MR. GETZ:** It would be less than 37, if --

12          **THE DEFENDANT:** Eighteen months.

13          **MR. GETZ:** It would be less than 37, if the Court  
14 decided two levels for obstruction were unwarranted.

15          **THE COURT:** Well, all right. Let's just find --

16          **THE DEFENDANT:** Your Honor, could I respond to --

17          **THE COURT:** If we were to go down even two more  
18 levels, what would it be? If you knocked out the obstruction  
19 of justice, what would it be?

20          **MR. NEWMAN:** Thirty to thirty-seven.

21          **THE DEFENDANT:** That's not true. It's 18 months.  
22 Hallinan -- that's what it was. It was 18. Eighteen months.

23          **MS. SEARLES:** Eighteen.

24          **MR. NEWMAN:** What?

25          **THE COURT:** All right. With respect to the motion to

1 withdraw the plea, I'll give you --

2 First of all, is Mr. Getz your lawyer, or not?

3 **THE DEFENDANT:** Your Honor, I would just like to  
4 address this, because he's not prepared to address these  
5 points.

6 **THE COURT:** No, no. Is he your lawyer? Have you  
7 fired him? Because you sent me a letter saying that he had  
8 been released as your attorney. Now, is that -- are you back  
9 on track with that?

10 **THE DEFENDANT:** I'm back on track right now, but I'm  
11 presenting this information, your Honor, at his approval.

12 What Mr. Newman just said, your Honor -- he started  
13 off completely off base. He said that I omitted  
14 490 Post Street in February 2001.

15 Let's start off by explaining. Piercy Bowler Taylor  
16 & Kern is an accounting firm in Las Vegas. They were hired  
17 solely to prepare what's called a "preopening cash statement"  
18 for the Silver City Casino, which is required by the Nevada  
19 Gaming Commission.

20 They weren't hired to do my tax returns.

21 **THE COURT:** Well, but here was the problem. The  
22 Gaming Commission didn't just fall off the turnip truck. They  
23 know that applicants always try to overstate their assets. So  
24 they want to see the tax returns, to see if the applicant is  
25 being honest. So the accountants have to look at the tax

1 returns --

2 **THE DEFENDANT:** No. I understand.

3 **THE COURT:** -- to see if they're consistent.

4 So -- and they caught you red handed, trying to show  
5 that you were wealthy guy to the tax -- to the Gaming  
6 Commission, when you were telling the United States Government  
7 you were broke.

8 **THE DEFENDANT:** Well, that's not true, your Honor.

9 **THE COURT:** That's the way I read this PSR.

10 **THE DEFENDANT:** Okay. Well, let me explain.

11 Piercy Bowler Taylor & Kern were in a dispute with  
12 me, and are biased against me. And that's a fact. They didn't  
13 put that in their declaration; but notwithstanding that fact,  
14 you can say, "Well, would they say this?" I don't know what  
15 they would say. They were fired. We just -- we had a dispute  
16 over funds. I haven't heard from them in years, the fact is,  
17 for starter income and net worth are completely unrelated.

18 I'll give you an example. A property next door to  
19 mine was purchased, you know, in Las Vegas for, you know,  
20 \$10 million. And they sold it for \$300 million ten years  
21 later. The fact is the appreciation of that property went up  
22 over ten years from \$10 million to \$300 million. So on paper  
23 they can go to the Gaming Commission or Judge Alsup and say,  
24 Listen, your Honor. I want \$200 million," but the fact of the  
25 matter is they have zero income, because it's not generating

1 income.

2           You could have a piece of land that's worth, you  
3 know, \$100 million that generates no income. You could be  
4 worth \$100 million. So income and net worth are completely  
5 unrelated. And the IRS doesn't ask what you're worth. They  
6 only ask what your income is. I reported what -- those sales  
7 on all of my tax returns, contrary to what Tom Newman says.  
8 They listed and itemized every single property that was sold in  
9 2000, 2001, and 2002. They're all on there. Every single  
10 property sold in the three years under indictment are on the  
11 tax returns.

12           And the information that I told the Piercy Bowler  
13 Taylor & Kern was estimated information. 490 Post Street  
14 didn't even sell until May of 2001.

15           And he says the conversation occurred in  
16 February 2001. So you have to give them an estimate, because  
17 that was four months before the property even sold. Okay? So  
18 you know what they're trying to essentially -- you know,  
19 they're on a witch hunt, you know. What you do is you find the  
20 person, put his feet under a fire, which was the Oakland Jail.  
21 Give him some food poisoning. Have him say he's a witch, and  
22 then kill him. Isn't that the way the trials worked back in  
23 those days? Then you go hang him.

24           The bottom line is, your Honor, I have borrowed  
25 \$800 million. I've paid back every lender every penny. I am

1 proud of that. It's incredible. Even under this indictment,  
2 I'm in the middle of \$100 million purchase: The repurchase of  
3 the Las Vegas shopping plaza. That's how much confidence my  
4 lenders have in me.

5           The true measure of someone's integrity in business  
6 is: Will they lend you money? Because, man, nobody's going to  
7 lend you a penny if they think you're a snake or if they think  
8 you're a fraud. And I have borrowed \$800 million without  
9 pedigree, without a father who has handed over, you know, his  
10 business contacts. I am extremely proud. I have  
11 Tony Crossley, Colliers International, sitting in the fourth  
12 row, who can testify to that. He's the executive vice  
13 president of Colliers. And I've honored all of my obligations.

14           The U.S. Attorney, your Honor, Tom Newman, was a tax  
15 attorney when they were suing me for \$11 million. Tom Newman  
16 there was U.S. tax attorney before he was a U.S. attorney, and  
17 wasn't on my case specifically, but they all communicate  
18 together. And they said I owed \$11 million for the preceding  
19 ten years. You know what. In -- your Honor, in this building  
20 in front of Judge Haynes, Judge Haynes ruled I owed nothing. I  
21 owed nothing for the preceding eight years. And they said I  
22 owed \$11 million.

23           So here we are now. The next three years they  
24 started off, your Honor, saying I owed \$1.5 million.

25           Man, it wasn't enough just to indict me and serve me

1 with papers. They went to the *Chronicle*. They went to the  
2 *Examiner*. They sent out press releases to anybody who would  
3 write it in their newspaper: Luke Brugnara is a cheat. He  
4 owes one and a half million dollars in taxes off, you know,  
5 \$60 million property.

6           You know, your Honor, here we are. Look at this two  
7 years later.

8           **THE COURT:** All right, Mr. Brugnara.

9           **THE DEFENDANT:** No, because they've come down  
10 90 percent, and I still dispute their million. They've come  
11 down 90 percent. Ninety percent. And, you know, the irony is,  
12 your Honor, for the entire spreadsheet, if you calculate all of  
13 the income, it's \$100 million.

14           It's a 1 percent deviation. That's considered a  
15 contingency in any business. I know you are familiar with  
16 that. 3 to 5 percent of gross is considered contingency  
17 factor. 1 percent -- that's pretty darn close. And I dispute  
18 that. I believe, like I said, I think it's between 2 and 3. I  
19 think it's actually 1/10 of 1 percent. 1/10 of 1 percent,  
20 your Honor. And that's why I asked you to let them go to trial  
21 just from the numeric, because numbers don't lie, your Honor.

22           I think that's also an important factor to consider  
23 if you decide this is worthy of going to trial, because,  
24 your Honor, you know, I know we have the Harris Taback issue of  
25 ineffective counsel.

1 And the fact that I was sick -- we have my mother's  
2 declaration on file, affirming the diarrhea, the fevers, the  
3 chills; my declaration, and my doctor's. So there's no dispute  
4 that I was sick.

5 There's no dispute that Harris Taback didn't do what  
6 he was supposed to do. And -- and now, on top of it, which I  
7 think is another issue to consider for the withdrawal of the  
8 plea, your Honor, to go to trial -- not to dismiss this case,  
9 but just to simply go to trial -- is the fact that this number  
10 we're talking about now is likely to be 1/10 of 1 percent.

11 1/10 of 1 percent, man. I have sat in jail for three months in  
12 a pod of 1,000 square feet with nine murderers. Luke Brugnara,  
13 the family man with four children, given away over a million to  
14 charity, haven't had as much as a traffic ticket in ten years.

15 The Wilson Baker murder. Gang-bang mass murderers.  
16 All they do is bang on their chairs 24/7 and scream, because  
17 they're going to prison last time in their life.

18 That's how much the U.S. Attorneys hate my guts.  
19 Solitary confinement, where I'm getting out two times a week.

20 Let me go to trial, because you know what. The  
21 number is 1/10 of 1 percent. That, itself, is worthy of going  
22 to trial. Fair, just reason having it go to trial, your Honor.

23 **THE COURT:** All right. I'm going to have to direct  
24 you. From now on, until it's time for me to let you have  
25 further say, you have an attorney. Everything else that you



1 need to say will be said through your attorney, Mr. Getz. He  
2 is supposed to represent you. He's one of the finest lawyers  
3 who practice in this court. And so you should not say anything  
4 more unless Mr. Getz wants to say it himself.

5 The motion to withdraw the plea is denied. The Court  
6 sent out a very long order explaining why, once before.

7 Nothing that you have said persuades me that there  
8 would be a fair and just reason to allow you to withdraw the  
9 plea. And I want to remind you and the people present that you  
10 pled guilty once before, a year -- not quite a year ago, but  
11 last year. And you admitted to everything under oath.

12 Then you fired that attorney, Mr. Wine, also one of  
13 the respected members of this court, and said that you had made  
14 a mistake, and it wasn't true, and you wanted to have your day  
15 in court. And I let you. I said, "Okay." I let you withdraw  
16 that plea.

17 Then you got a new lawyer: Mr. Taback. And we go  
18 down that path, after you were out on bail. It necessitated a  
19 six-month-longer delay -- maybe seven months, eight months --  
20 coming up to the next trial. And on the eve of that trial, you  
21 decided to plead guilty yet again.

22 Then time goes on. And you get a new attorney; fire  
23 that attorney.

24 And you now have Mr. Getz as your attorney. And you  
25 wanted to withdraw that plea. A second time you had pled

1 guilty to the same thing.

2           And then I get letters from you like this recent one,  
3 where you want to fire -- of course, now you're saying you're  
4 back okay with Mr. Getz, but at least when you wrote this  
5 letter on May 21, you were saying that he was being released as  
6 your attorney because he wouldn't do X, Y, Z.

7           Well, you are under oath. And you told me you were  
8 feeling fine; you were thinking clearly. You admitted to all  
9 of the crimes. The Government had a detailed recitation of the  
10 facts in the record to support the factual basis for the plea.

11           Yes, at one point in time you clearly had a right to  
12 go to trial if you wanted to, but two times you have now pled  
13 guilty. And it's not as easy as just saying, "Oh, next week  
14 we'll have a trial." No. That's not the way it works. It  
15 takes a -- it's a major effort to get geared up for a trial.

16           So the Court is convinced that you are trying to game  
17 the system; that we get right up to the edge of a trial, and --  
18 wham-o! -- you decide to plead guilty. And after the pressure  
19 is off, you decide to withdraw your plea, fire that attorney,  
20 get another attorney. This could go on forever.

21           The Court is convinced to a moral certainty you are  
22 indeed guilty of what you pled guilty to. There's enough of a  
23 record for that. If I thought you were innocent, I would let  
24 you go to trial, but it's clear that you're not. And you are  
25 guilty. So -- at least, based on this record.

1           So the motion is denied. And we're now going to  
2 proceed to sentencing. And from this point on, you don't get  
3 to say anything until I let you. Your lawyer's going to do all  
4 of the talking.

5           Mr. Getz, are there any other paragraphs that are --  
6 to which -- in the PSR -- let me ask you this, Mr. Getz. Did  
7 Mr. Brugnara get a copy of this presentence report?

8           **MR. GETZ:** Yes, he did. And he would like to augment  
9 his earlier filings with the documents that were handed up to  
10 your Honor this morning. And, pursuant to Rule 47, I make the  
11 motion permitting those to become part of the record.

12           **THE COURT:** Just a moment, Mr. Brugnara. I need to  
13 ask you to just say "Yes" or "No." Did you receive and read  
14 the presentence investigation report?

15           **THE DEFENDANT:** I have to see it. I received a  
16 report.

17           **THE COURT:** Show it, please, to --

18           **THE DEFENDANT:** Yes.

19           **THE COURT:** All right. Thank you. All right. These  
20 additional materials -- has the Government seen them?

21           **MR. NEWMAN:** Yes, your Honor.

22           **THE COURT:** Including the one with the long tax  
23 spreadsheet?

24           **MR. NEWMAN:** No.

25           **THE COURT:** I'm going to hand this down to you, so

1 you take a look at it and see -- tell me if you've seen that  
2 before.

3 **MR. NEWMAN:** I haven't, your Honor. I can look at it  
4 now, if that's what you're asking.

5 **THE COURT:** Well, take a short moment to look at it.  
6 And tell me what the Government's view is on what should be  
7 done with those pages.

8 **MR. NEWMAN:** Your Honor, I don't believe it's  
9 appropriate to file them, since they have been received so  
10 late. I think that any submission to the probation officer or  
11 to the Court should have been made weeks in advance of this  
12 hearing.

13 **THE COURT:** What do you say to that, Mr. Getz?

14 **MR. GETZ:** I think, while the papers are submitted  
15 late, the Court has the discretion to permit the entry into the  
16 record, so that Mr. Brugnara can complete the record. He has  
17 offered things late in a *pro se* filing. I think that he feels  
18 the record's inadequate without those documents, and I think  
19 the Court should admit it.

20 **MR. NEWMAN:** I would add, your Honor, I think that  
21 these are completely duplicative of the declarations that were  
22 already filed last week. They essentially -- all of them --  
23 say the same thing. They're not sworn testimony of anything.  
24 They're just letters.

25 **THE COURT:** All right. The Court will allow this to

1 be made part of the Clerk's record. And I'm referring to a  
2 May 21, 2010, grouping of about seven pages, handwritten, with  
3 one typewritten spreadsheet called, "IRS Tax Spreadsheet."

4 And I'm not saying that this is something that the  
5 Court should properly take into account as timely, but it ought  
6 to at least be there for the benefit of the Ninth Circuit.

7 **MR. GETZ:** Thank you.

8 **THE COURT:** All right. Now, are there any unresolved  
9 objections to the presentence report, Mr. Getz?

10 **MR. GETZ:** Much as Mr. Brugnara articulated in his  
11 motion for reconsideration on the motion to withdraw the plea,  
12 of course, based on what the Court's admitted into evidence and  
13 what's been enunciated here in court, he renews his motion for  
14 an evidentiary hearing on the tax loss.

15 **THE COURT:** Well, he said earlier that his tax loss  
16 was \$300,000.

17 **MR. GETZ:** His position is the tax loss does not  
18 exceed \$300,000. And if the Court is going to select a  
19 guideline range to articulate a sentence, then the numbers  
20 should correspond with the \$300,000 figure, which coincides  
21 with the initial plea of guilty in this case, which was later  
22 rejected by the Court.

23 **THE COURT:** No. Once you -- that was an 11(C)(1)(c).  
24 And it doesn't work that way. Once you strike a deal with the  
25 Government, the Government is bound by that deal; but you get

1 to get out of it. It's a new ball game for both sides. The  
2 Government is not bound by the negotiations that went on in  
3 that 11(C)(1)(c) negotiation.

4 **MR. GETZ:** Of course, the Courts correct's in that,  
5 but I think there's an equitable consideration here, which I  
6 think the Court might consider, and the equitable consideration  
7 is: There was a time not so long ago when the Government's  
8 estimate at the time of the change of plea of the loss  
9 calculation was 300,000. Later, the Government took the  
10 position that the loss calculation should be 2.5.

11 I think that's something that should concern the  
12 Court. And I think that, alone, would have a basis for  
13 requesting an evidentiary hearing. And that was the motive and  
14 the reason why Mr. Brugnara filed the *pro se* filings.

15 **THE COURT:** What does the Government say about an  
16 evidentiary hearing?

17 **MR. NEWMAN:** Your Honor, may I hand this up to you?  
18 And I'll respond after I --

19 (Whereupon a document was tendered to the Court)

20 **MR. NEWMAN:** There isn't any reason for an  
21 evidentiary hearing. As a factual matter, even if the facts  
22 were supported, I would ask you to turn to just page 1041. I  
23 think it's tabbed. And, for clarification, that's a decision.  
24 It's *U.S. v. Yip*. And the reason I gave it to you is that the  
25 tax loss is determined based on all possible deductions that

1 are claimed on an individual's tax return.

2 The declaration and the method used to compute the  
3 defendant's tax loss in this case gave him the benefit of every  
4 deduction he claimed on his tax return.

5 And what I'm referring to in this decision is the  
6 paragraph that begins Section 2T1.1 on page 1041 of the  
7 decision. And it ends with that section. It does not require  
8 a Court to speculate about tax deductions that a taxpayer chose  
9 not to claim.

10 The tax loss that was computed in this case gave the  
11 defendant the benefit of a loss carryforward of roughly about  
12 \$5 million from 1998. That's not a charged year. That was  
13 route -- forward to 2000, which is a charged year. The  
14 defendant claimed that \$9 million tax loss, or he claimed a  
15 \$9 million loss for 1999. That's not a charged year. He also  
16 left off the sale of a property that year. The sale of that  
17 property was added back to 1999, and the remainder of the loss  
18 was carried forward to 2000.

19 So he's given the benefits of every single deduction,  
20 whether it's included on his charged returns 2000 and 2002, and  
21 loss carryforwards that were not carried forward. He didn't  
22 carry forward the loss from 1998. The Government gave it to  
23 him. The same is true for '99. And this \$1.9 million number  
24 that's mentioned at the end of the declaration that was filed  
25 in support of the tax loss carries back a \$3 million loss from

1 2003 that is claimed on his 2003 tax return. The defendant is  
2 given every other deduction that's claimed on the charged  
3 returns.

4 **THE COURT:** Is it true that you said you agreed with  
5 the defendant months ago that it was 300,000, and now you're up  
6 to 2.4?

7 **MR. NEWMAN:** Up to 1.9. I would agree with the 1.9  
8 number.

9 **THE COURT:** Was it 300,000 back then?

10 **MR. NEWMAN:** I will explain that, your Honor. Part  
11 of the difference -- or I've got to say the major difference  
12 was the way the loss was computed the last time. And I agreed  
13 with that as part of a plea. It was a negotiated plea. And we  
14 can settle based on whatever terms, but one of the things that  
15 changed about the numbers was the original loss figures carried  
16 forward a loss from 1999 that I said before of \$9 million.

17 What it didn't do was add back a building that  
18 Mr. Brugnara sold that year. And I was not aware of that, but  
19 this revenue agent -- we changed revenue agents. He looked  
20 everything over, and he added back that sale. I can't give  
21 figures to the Court.

22 If you want me to say were those numbers too low -- I  
23 mean, they -- turns out that they were. These aren't numbers  
24 that I created. These weren't numbers that the IRS calculated.

25 Based on the defendant's own tax returns, they gave



1 him the benefit of every loss carried forward. And the  
2 original loss figures that I had -- it was actually much more  
3 than that. It's just they didn't give him the benefit of an  
4 Alternative Minimum Tax.

5 **THE COURT:** How long would it take to do an  
6 evidentiary hearing?

7 **MR. NEWMAN:** I don't think it would take that long,  
8 your Honor.

9 **THE COURT:** Well, let me ask Mr. Getz this question.  
10 Would it be acceptable to you that the Court take  
11 \$300,000 as the tax loss amount, and use that? Not up to, but  
12 right at 300,000. That would be alternative one.

13 Alternative two would be to hold an evidentiary  
14 hearing, where it may turn out that the number's lower. Could  
15 turn out that the number's a lot higher.

16 So --

17 **MR. GETZ:** May I have just a moment?

18 **THE COURT:** I mean, in other words, holding an  
19 evidentiary hearing could help; but it could also hurt your  
20 client. So what do you want to do there?

21 (Discussion off the record)

22 **MR. NEWMAN:** If I could address that, your Honor, I  
23 don't think it could help, which is the point of turning that  
24 up there, is that you can't claim any previously unclaimed  
25 deductions. If the defendant came back with \$50 million of

1 deductions, even if they were legitimate, the Court can't  
2 accept them.

3 **THE COURT:** Why is that? Because they were  
4 unclaimed?

5 **MR. NEWMAN:** Because they were previously unclaimed,  
6 he's given the benefit of everything on his return.

7 I mean, if the defendant wants to address the choices  
8 the Court gave him -- but that's what that ruling says.

9 **THE COURT:** Well, it does say that. So is -- if the  
10 idea, Mr. Getz, is that he could come in with deductions he  
11 could have taken, but somehow forgot to take, I think this  
12 decision does say you cannot do that.

13 **MR. GETZ:** It's on appeal in *U.S. versus Yip*. And  
14 *U.S. versus Yip* doesn't address the evidentiary value of  
15 something that's offered at trial.

16 So, of course, initially what the Court heard and  
17 ruled upon was a motion to withdraw the plea. *Arguendo*, if the  
18 plea has been withdrawn and we're going to trial, we're not  
19 limited to what is in his tax return, where he's putting forth  
20 a defense based on a good-faith effort that his numbers were  
21 right. He can be acquitted even if the numbers are wrong; but,  
22 to answer the Court's question, we would agree with the  
23 \$300,000 figure as a basis for the Court's sentencing  
24 calculation.

25 **THE COURT:** That's what I want to do. All right. So

1 that issue is off the table.

2 What else -- I will take 300,000 as the basis for the  
3 sentence that the Court plans to give; not that I plan right  
4 now, but whatever it is is going to use 300,000 as the tax  
5 loss.

6 All right. Are there any other paragraphs that you  
7 want to object to?

8 **MR. GETZ:** Of course, we have raised certain issues  
9 in our sentencing memorandum regarding the calculations, such  
10 as obstruction-of-justice points, acceptance of responsibility,  
11 and overrepresentation of the criminal-history category.

12 **THE COURT:** All right. Well, let's take -- let's go  
13 to acceptance of responsibility first. What's your argument  
14 there?

15 **MR. GETZ:** The argument there is Mr. Brugnara has  
16 pled guilty twice. When has the Court ever seen that before?  
17 If the Court's going to sentence him on the second of the  
18 guilty pleas, I think, as a matter of fact, there was some  
19 acceptance of responsibility at the time the guilty plea was  
20 entered.

21 Now what's happened since then is a matter of record,  
22 but even the guidelines say a defendant who goes to trial can  
23 still get acceptance-of-responsibility points, a category I  
24 pointed out in the brief. And I'd ask the Court to find that  
25 he should get some acceptance points. If not the full three

1 points, then give him two.

2 **THE COURT:** What does the Government say to that?

3 **MR. NEWMAN:** It's the defendant's burden to prove  
4 that he's entitled to the reduction; either the two points or  
5 three points in this case. And he hasn't shown that. He pled  
6 guilty twice, but since then, he's vacillated back and forth  
7 between professing innocence, whether under or not under oath,  
8 and essentially balking at forcing the Government to prove its  
9 case.

10 He's here today. He's not saying that he's guilty,  
11 and that he's willing to accept responsibility here, which is  
12 exactly what the two points are for.

13 Months ago when he pled guilty, he's done anything  
14 but reduce the burden on the Court or on the Government, and  
15 maintain a position that he's guilty. He has said anything but  
16 that he's guilty. He's made the Government do this and that in  
17 the case, and asked to have him detained. He has shown nothing  
18 to express the fact that he feels that he is guilty in this  
19 case. And I don't think it's warranted.

20 **THE COURT:** All right. Let's hear about the  
21 obstruction of justice.

22 **MR. GETZ:** We address that on page 8 of our brief.  
23 And it's something of a moving target, really, that the  
24 Government offers, because the obstruction basis has been  
25 offered on a variety of grounds, both in the Government filing

1 the sentencing memorandum, and it's also reflected in the  
2 federal probation officer's report regarding testimony before  
3 the Nevada Gaming Commission; but overlooked, for the most  
4 part, is the notion that if a person says something that they  
5 believe to be true, even if it's false, there cannot be  
6 obstruction levels awarded.

7           And so I guess the question becomes: Even if we  
8 agree upon the conduct, what was the state of mind of  
9 Mr. Brugnara at the time he made the assertions, both before  
10 the Nevada Gaming Commission and elsewhere?

11           And I submit to the Court that what he said, he  
12 believed to be true at the time it was said, along the lines  
13 of, "I filed my income taxes." He had sent documents in which  
14 were inadequate. Ultimately, they had to be resubmitted, but  
15 whether that rises to the level of obstruction can only be  
16 based on his state of mind at the time of his words. And I  
17 submit to the Court that he believed it to be true when he said  
18 it.

19           And I think there's ample record made in this case of  
20 how his mind works. He has a facile mind, a flexible mind. He  
21 thinks broadly. He is grandiose in his vision. He has the  
22 ability to look at things in a broad spectrum of colors. He  
23 expresses himself well before the Court. And his mind is  
24 moving. There's pressured speech. There are racing thoughts.  
25 He expresses himself in a unique way. And if what he did

1 before the Nevada Gaming Commission is anything like what this  
2 Court has seen, then I think that this Court can find a basis  
3 in finding that he believed it when he said it. And if he  
4 believed it when he said it, even if he's wrong, then he did  
5 not obstruct.

6 **THE COURT:** Mr. Newman.

7 **MR. NEWMAN:** Well, for clarification, I've never  
8 asserted that defendant is liable for the obstruction  
9 enhancement, or provided any information based on what happened  
10 before the Nevada Gaming Commission.

11 It was actually based on a note to 3(C)1.1 about  
12 providing false testimony under oath under a related civil  
13 investigation, which would be the IRS audit. And the defendant  
14 did provide testimony under oath.

15 And, your Honor --

16 **THE COURT:** I'm sorry. The paragraph 43 is referring  
17 to giving an oath in a civil proceeding that he had filed his  
18 tax returns when he had not. Now, that's what --

19 **MR. NEWMAN:** Yes, your Honor.

20 **THE COURT:** So address that one, not the tax returns;  
21 but what was the testimony? Was that before the Nevada Gaming  
22 Commission?

23 **MR. NEWMAN:** No, it wasn't. It was before the IRS.  
24 And it was a summons proceeding done under oath. It was  
25 essentially a deposition. And that was the only thing that the

1 probation officer listed.

2           And I think it was only because it -- true, I had a  
3 number of reasons that I had given, but we had the  
4 meet-and-confer. So I left the meet-and-confer believing that  
5 this was a resolved issue, because everyone agreed on the  
6 facts. And I provided all of the statements. Now, the  
7 defendant provided --

8           **THE COURT:** You mean, you're saying that Mr. Getz  
9 agreed to the two points?

10           **MR. NEWMAN:** I had believed that. And I'm not  
11 putting Mr. Getz or attempting to put him on the spot, but we  
12 left the meet-and-confer. That was the only reason left on the  
13 report, because I believed it was resolved after the  
14 meet-and-confer. The objections actually don't have this  
15 listed as unresolved, for, I think, that very reason, but I  
16 will address it now.

17           **THE COURT:** Well, just -- well, before you address  
18 any -- whether it was resolved or not on the one item that's  
19 listed in paragraph 43, which I think is the only one I should  
20 be taking into account, did he file his returns?

21           **MR. NEWMAN:** He filed returns. And he had -- he  
22 testified under oath that he filed them on a timely basis; that  
23 he gave the tax returns -- they were filed with the IRS, so  
24 they would have been received.

25           Whether there's an extension or not timely -- that's

1 actually not true. And that is false testimony among --

2 **THE COURT:** This doesn't go to timely. Doesn't say  
3 anything about timely. Ms. Searles' report -- she doesn't say  
4 timely or not timely.

5 **MR. NEWMAN:** He testified under oath that he filed  
6 all of his tax returns on time. And that's what the objection  
7 should say, or what the enhancement should be liable for.

8 **THE COURT:** Ms. Searles, what's going on here? I  
9 don't see the word "timely."

10 **MS. SEARLES:** Well, your Honor, if you look at  
11 page 8, paragraph 27 and paragraph 28, that's the narrative  
12 that supports the obstruction-of-justice enhancement that was  
13 given to me by Mr. Newman.

14 **THE COURT:** Paragraph 8?

15 **MS. SEARLES:** Your Honor, page 8, paragraph 27 and  
16 paragraph 28.

17 **THE COURT:** So are the true facts that he had never  
18 filed returns, but had only asked for extensions?

19 **MR. NEWMAN:** No. He'd never asked for extensions.  
20 The facts would be that he provided testimony under oath that  
21 all of his tax returns were filed on time when, in fact, they  
22 weren't.

23 **THE COURT:** And the reason they weren't? It  
24 wasn't -- what were the true facts?

25 **MR. NEWMAN:** That they were all filed late. And some



1 of them hadn't even been received, but the defendant insisted  
2 that they were already filed.

3 **MR. GETZ:** That's exactly it. They were filed late.  
4 And that was the basis of the claim that they were filed. They  
5 were filed improperly. They were filed inadequately, but they  
6 were filed late. And so to call that "obstruction" is to just  
7 run roughshod over the state-of-mind exception to the  
8 obstruction finding, and that's what I'm asking the Court to  
9 focus on. And the paragraph --

10 **THE COURT:** Did he say that he had time -- did he  
11 testify he had timely filed?

12 **MR. NEWMAN:** Yes.

13 **THE DEFENDANT:** Could I make a comment, your Honor?

14 **THE COURT:** No, no. Mr. Getz is your lawyer.

15 Just a second.

16 Mr. Newman, read to me the testimony where the word  
17 "timely" was used.

18 **MR. NEWMAN:** Your Honor, may I pass this up to you,  
19 so that you can have it? I will read it to you. This is the  
20 same information. It's filed materials that I had already  
21 given to the probation officer. And the defense have this as  
22 well.

23 **THE COURT:** What page do you want me to look at?

24 **MR. NEWMAN:** I had marked the page. I think I made a  
25 line underneath it. It's page number 70, on the left-hand

1 corner. And the testimony is,

2 "My position is that I did file the  
3 returns in the timely fashion for these  
4 years, and that you have copies of all of  
5 these tax returns."

6 And that is page 70, lines 15 through 20.

7 **MR. GETZ:** That's exactly right. And when he said,  
8 "My position is," he is stating a state-of-mind exception to  
9 the rule that that's obstruction.

10 And I can't see how the Court can look at that, when  
11 he uses the phrase, "My position," as the same as if he were a  
12 forensic accountant, which he is not; a tax lawyer, which he is  
13 not; a C.P.A., which he is not. And the most important thing  
14 is: He did his taxes himself. And when he states that that's  
15 his position, that was his position. So how can that be  
16 obstruction?

17 **MR. NEWMAN:** Okay. And so that's the testimony. And  
18 he states his position.

19 On the very next page, he said -- October 15th, 1999,  
20 letter from the defendant's broker stating that the defendant,  
21 in fact, had not filed his tax return for 1998 yet, and that he  
22 was expecting to be liable for penalties. That would be the  
23 basis for the reason why the false information is material, is  
24 a late return would require the defendant to be subject to  
25 penalties under Internal Revenue Code 6651.

1           **THE COURT:** Wait. What? You say something on the  
2 next page?

3           **MR. NEWMAN:** On the very next page, if you turn to  
4 the next page, the physical next page.

5           **THE COURT:** Oh, oh. I see.

6           **MR. NEWMAN:** It's a letter from the defendant's  
7 broker saying he hasn't filed his 1998 tax return yet. That  
8 letter's dated October 15th.

9           **THE COURT:** When was this testimony?

10          **MR. NEWMAN:** That letter -- when the letter was at a  
11 time, you mean? Oh. The testimony was from 2004.

12          **THE COURT:** Well, between '99 and 2004. Did he file  
13 for that year?

14          **MR. NEWMAN:** He eventually filed. The return is on  
15 the next page, your Honor.

16          **THE COURT:** Well, what year did he file that return?

17          **MR. NEWMAN:** He filed it in 2000.

18          **THE COURT:** So by the time of the deposition, he  
19 would have -- he said, "My position is that I did file the  
20 returns in a timely fashion."

21                 All right. I'm going to hand that back to the  
22 Government.

23                 All right. Anything more on that  
24 obstruction-of-justice point?

25          **MR. GETZ:** Only to add that a qualified assertion of

1 timeliness cannot possibly be the basis of obstruction of  
2 justice.

3 **THE COURT:** All right. What else is there to argue  
4 over?

5 **MR. NEWMAN:** There was, well, obstruction. There  
6 were other additional points that the Government had.

7 Your Honor, when the defendant was released from his  
8 plea on June 9th -- or not released from his plea, but we had a  
9 hearing about it on June 9th of 2009. He told your Honor that  
10 he didn't have enough money to hire an attorney, and that he  
11 wanted a C.J.A. appointment. And we had five or six hearings  
12 to get such an appointment.

13 As part of Docket Number 67 in this case, the  
14 Government filed something to have his release conditions  
15 modified because, in fact, around the same time or several  
16 months later, in December of 2009, the defendant filed a  
17 complaint in bankruptcy court, indicating that he had paintings  
18 worth roughly \$1 million that he purchased in 2003 that were  
19 being held by Sotheby's.

20 That is false information provided to a judge or  
21 magistrate, as provided for in Note F to 3(C)1.1, in that he  
22 told your Honor that he had no money to pay for an attorney,  
23 and no assets, when, in fact, he was holding a million dollars'  
24 worth of artwork that he gave to Sotheby's to sell.

25 **THE DEFENDANT:** Can I respond, your Honor, to that?

1 Because Mr. Getz doesn't know the particulars.

2 **MR. GETZ:** If it's okay with the Court, it's all  
3 right with me if he responds to that.

4 **THE DEFENDANT:** Your Honor, if the paintings -- there  
5 was no misrepresentation to you or bankruptcy court. Those  
6 paintings were, in fact, liened, and not in my possession.  
7 They were in the possession of Sotheby's, and had a secured  
8 lien against them. And the secured creditors in  
9 Judge Montali's bankruptcy signed off that, in fact, there was  
10 no equities in those paintings over and above the secured  
11 paintings of Sotheby's Financial Services.

12 And what was the other one?

13 **MR. GETZ:** Let me finish this. It shouldn't surprise  
14 the Court that somebody in a commercial-real-estate posture  
15 would have a cash-flow problem. At the time Mr. Brugnara said  
16 he did not have funds to hire a lawyer, that was absolutely,  
17 100 percent true. He had no money to hire a lawyer.

18 Now, it may be that he had an expectancy of some  
19 money later. It may be that he had something he could look  
20 forward to, if something sold. It may be that somebody was  
21 going to step forward later; but the Court has to look at the  
22 context. At the time he said it, it was factually true. He  
23 didn't have any money.

24 He had business interests, and bankruptcy. There  
25 were no funds to hire a lawyer for a case of this magnitude.

1 So it's true at the time he said it.

2 Later, when he was able to obtain funds, he obtained  
3 counsel; but I fail to see how the Government can argue  
4 obstruction based on a true statement that was said in a  
5 situation that was financially fluid, and changed later.

6 **THE COURT:** Are there any other grounds for  
7 obstruction of justice that the Government wants to argue?

8 **MR. NEWMAN:** No, no. The most recent filings the  
9 defendant gave to your Honor from last week. And the one that  
10 was Docket Entry 119, the defendant responds to the  
11 Government's sentencing memo, and indicates that he never filed  
12 a tax return with the IRS that was inconsistent with anything  
13 that he ever gave to a lender. Again, I would say that that is  
14 false information provided to a judge or magistrate as part of  
15 Note F to 3(C)1.1.

16 I have already filed in this case two 1994 tax  
17 returns, both signed by the defendant under oath; one of them  
18 provided to a lender, indicating that his income was \$489,000  
19 for 1994, and he had a tax liability for \$156,000 and change.  
20 His filed 1994 tax return with the IRS indicates net income of  
21 negative \$142,721.

22 We're here at sentencing. The defendant is telling  
23 the Court he's never done this. There are other examples of  
24 this. This is false information attempting to assuage the  
25 Court or persuade it that none of these things are true, but

1 that is not the case.

2           There are many examples of exactly what's in the PSR  
3 can be proven to be true. And I don't know why we're getting  
4 to objections to these things and counter-arguments that are  
5 both irrelevant and inconsistent with the PSR, but the  
6 defendant's not giving the Court correct information.

7           **MR. GETZ:** If I may, your Honor, at the  
8 meet-and-confer we conceded certain conduct. And therein may  
9 lie the confusion between what was resolved and what wasn't.

10           We conceded there was certain conduct on the part of  
11 Mr. Brugnara in what he said and what he filed that was  
12 factually wrong; but we never conceded that he was  
13 intentionally trying to put one over on this Court, or any  
14 other Court, or that he was trying to mislead any fact finder.

15           The basis for the discussion at the meet-and-confer,  
16 from our perspective, is that when he says certain things, he  
17 believes it at the time that it is said. And that -- that  
18 flamboyant method of presenting himself has been consistent  
19 through this whole case. And it's just not -- it's not  
20 obstruction. It may be puffery. It may be exaggeration. It  
21 may be fantasy, but it's not obstruction of justice.

22           Obstruction of justice requires a knowing and  
23 intelligent fraud perpetrated upon someone who is engaged in  
24 the decision-making process. And that's not what he's ever  
25 done. And every episode that is being recounted here is an

1 example of his racing thought process, where he says something  
2 that comes into his head, believing it to be so at that moment.

3 **THE DEFENDANT:** Your Honor, also -- no. Regarding  
4 the tax, that's serious, in my opinion. Hey, listen. You give  
5 this to -- it's 17 years ago. Still, I don't care. This is my  
6 reputation. The proof is in Judge Haynes' ruling. For those  
7 tax years, there was a zero tax loss. In fact, there was loss  
8 carried forward. The tax return that was provided first was a  
9 draft return in preparation of these returns. This is 17 years  
10 ago.

11 The correct return was provided prior to the loan  
12 funding. And the loan, in fact, funded and was paid off in  
13 full. And, in fact, the corrected return -- not the draft --  
14 was the basis for the loan. And, in fact, it was ruled in  
15 Judge Haynes' court that that was correct. That's, in fact,  
16 proper, of -- what to do if, in fact, you have an incorrect  
17 return, a draft return, and people are pressing you.

18 I don't know that. You didn't ask, "What do you  
19 have? Do you have a draft in front of you? Do you have an  
20 informational return?"

21 **THE COURT:** You're not supposed to be talking. It's  
22 supposed to be Mr. Getz. I've listened to what you've had to  
23 say, but it's gone on too long.

24 All right. Any other issues on the -- on the  
25 guideline calculation?



1           **MR. GETZ:** Over-representation of the  
2 criminal-history category. I address this in the brief on  
3 page --

4           **THE COURT:** Do you think it should be one?

5           **MR. GETZ:** I do.

6           There are lot of people that get sentenced as a  
7 Category 1 with less than what he's got. If what he's got is  
8 referring to his criminal convictions -- a misdemeanor. He  
9 has been boisterous and rude. He has been loud and volatile.

10           There's not one thing in there about him hitting  
11 anybody. There is a little bit of roughhousing regarding the  
12 Christie Rigs (phonetic) episode.

13           **THE DEFENDANT:** That's not true.

14           **MR. GETZ:** But no one has said that he's ever struck  
15 anyone; not anyone saying they've been struck, nor anyone  
16 saying he ever has been seen to strike. It's all verbal. It's  
17 all happening in his head. There isn't anything factual that's  
18 felonious about anything that he's done.

19           And, as I've pointed out in the memorandum, he missed  
20 by about 12 months not getting that extra point for having  
21 something happen while he's on probation, because that would  
22 have been three-year probation, and it happened in the second  
23 month of his misdemeanor probation.

24           **THE COURT:** Did you get this addendum? Did you --  
25 Ms. Searles, did you provide the addendum --

1           **MS. SEARLES:** Yes, I did, your Honor.

2           **THE COURT:** -- to counsel?

3           There's an October 2008 incident?

4           **MR. GETZ:** Well --

5           **THE COURT:** A request for orders to stop harassment  
6 filed by the Pastor and Principal of St. Vincent de Paul  
7 School, where Mr. Brugnara threw a bottle of water at the  
8 coach; walked on the field; obscenities; traumatized the  
9 students.

10          **THE DEFENDANT:** That's not true.

11          **THE COURT:** It goes on and on about how he has  
12 terrified people at the soccer.

13          And then later on, another school official:

14                 "When he is upset, he screams and  
15 yells, as well as making threats. He  
16 forced a parent off the road, onto the  
17 sidewalk, with his car because her son had  
18 called his son 'fat.' Mr. Brugnara has a  
19 volatile nature. He can be abusive. He  
20 screams at school personnel and parents."

21          Now, this is all recent. You were saying a while ago  
22 it was nothing in the last ten years, but this is -- these are  
23 things in the last ten years.

24          **MR. GETZ:** We filed a brief in response to that. Has  
25 the Court received it?

1           **THE COURT:** I don't think so.

2           **THE DEFENDANT:** Well, I want to respond.

3           **THE COURT:** No, no. I want to hear Mr. Getz' --

4           **THE DEFENDANT:** Well, I haven't discussed it with  
5 Mr. Getz, so I'll tell you. For starters, I coach the baseball  
6 team at St. Vincent de Paul. And I -- I didn't harm or do  
7 anything. I politely went over to a soccer coach, who was  
8 another coach, and I told him they need to follow the rules. I  
9 never used what he said; never threw a bottle at him or anyone  
10 else.

11           Catholic Charities received a million dollars from  
12 me, your Honor, between 1999 and 2003, through  
13 Archbishop Levada. I'm sure he won't approve of that letter  
14 being sent to you. So, you know, we can go on a diatribe about  
15 the Catholic Church for probably for the rest of the day, but  
16 the fact is I did not threaten that coach ever.

17           **MR. GETZ:** I would like to augment the intemperate  
18 outburst once again from Mr. Brugnara, by saying that -- and  
19 this was in the brief which we dropped off Friday, but I take  
20 responsibility for not filing it earlier. If you have a civil  
21 action along the lines of a restraining order that never  
22 becomes a criminal case, never becomes a criminal arrest, never  
23 becomes a restraining order in a criminal case, which we have,  
24 it's under the Penal Code. It happens down at 850  
25 Bryant Street every day. How can this elevate to the level of

1 criminal conduct that can be factored into whether someone's  
2 criminal-history category is over- or under-represented? I  
3 just don't see it.

4           If he had been -- if he had been charged with a Penal  
5 Code 415 for disturbing somebody's peace, if he had been  
6 charged with a Penal Code 4153, for fighting words, swear  
7 words, loud words, anything -- if he had been arrested or if he  
8 had been contacted by the police, I would make the argument.

9           But you have a situation where a civil restraining  
10 order is sought, which people have a right to do. And there's  
11 a reason why they call it "civil"; but no criminal restraining  
12 order is sought. No criminal case ever arises. And he's never  
13 arrested.

14           How can this be something in criminal-history  
15 category? It seems to be a distortion of what it is.

16           We have separate categories: Civil, and criminal.  
17 And all of these things that the Court has reviewed in  
18 connection with the soccer game were all in a civil context.  
19 And that's why I say that these other things that were criminal  
20 are stale. And I think they're -- the Court can consider the  
21 age in trying to decide whether he's Category 1 or 2.

22           And also, he missed with that bottle, your Honor. So  
23 in terms of my earlier statement --

24           **THE COURT:** He just told me he didn't throw it.

25           **THE DEFENDANT:** He's joking. I didn't throw any

1 bottle. I'm the baseball coach.

2 **THE COURT:** I didn't rob the bank; but if I did, I  
3 didn't get much money.

4 **THE DEFENDANT:** Your Honor, I'm the baseball coach.  
5 They wouldn't have me as the baseball coach if I was  
6 inappropriate. I have four children. Perfect conduct.  
7 Straight A's. I am very proud of them.

8 **THE COURT:** Ms. Searles, why is it Category 2 if it's  
9 only one point?

10 **MS. SEARLES:** Your Honor, he was on probation while  
11 he committed part of the instant offense, so he received  
12 additional two points for that. And that's noted in paragraph  
13 57.

14 **THE COURT:** All right. Let me see that. So three  
15 points. That gets us up to Roman Numeral II?

16 **MS. SEARLES:** Yes.

17 **THE COURT:** Without regard to the water bottle and --

18 **MS. SEARLES:** Those matters did not factor into his  
19 criminal-history category, your Honor. This is just based on  
20 the convictions.

21 **THE COURT:** All right. Okay. All right. What else  
22 do you want to raise on trying to get the right sentencing  
23 category into the guidelines?

24 **MR. NEWMAN:** Well, your Honor, since we're on  
25 criminal history, the Government did note and the PSR does

1 note -- and I'm saying this because I don't agree with the  
2 reduction of the criminal-history category to a 1 -- that there  
3 are numerous other incidents that would fall into what is  
4 described in 4(a)1.32(E) of other similar conduct not resulting  
5 in a criminal conviction.

6           The 1994 tax returns -- I had already talked about  
7 two of them: One different that was filed with the IRS  
8 claiming negative \$142,000 of income, and one that was given to  
9 a bank. That is -- that did not result in the conviction, but  
10 it is undoubtedly mail fraud.

11           **MR. GETZ:** No.

12           **MR. NEWMAN:** The defendant also gave testimony under  
13 oath to the IRS that his accountants -- the same accountants  
14 that provided declarations in this case -- told him that  
15 whether he had positive income, no income, or negative income,  
16 he was required to file corporate tax returns for every  
17 corporation he owned or controlled.

18           The failure to do so is a violation of  
19 26 U.S.C. 7203.

20           And in giving that number of an estimated 30  
21 violations, that only counts, from the advice given to -- given  
22 by the accountants in 2001 or 2000 until about 2004, seven  
23 entities that failed to file returns. And Mr. Brugnara  
24 testified under oath at these 2004 hearings he was required to  
25 file corporate tax returns including 1120s.

1           Here they are (indicating). He gave them to banks,  
2 but he never filed them with the IRS, from at least 2000, when  
3 he received that advice, to at least 2005, when he could have  
4 legitimately claimed, on advice of counsel, that he was no  
5 longer filing returns because there was a criminal  
6 investigation.

7           Up until that time, he had consistently testified to  
8 the IRS that those accountants told him he had to file  
9 corporate tax returns. And, in fact, he had been giving them  
10 to banks up until his recently as 2007.

11           All of the corporate tax returns that he gave to the  
12 banks, including the ones for the charged years that were never  
13 filed, report positive incomes for his own tax returns.  
14 Don't --

15           **THE DEFENDANT:** They're trying to --

16           **MR. NEWMAN:** That's a violation. It would be wire  
17 fraud, and failure to file corporate tax returns.

18           He's the one that testified under oath. And he was  
19 required to do it. At the very least, I don't think there  
20 would be a basis for a downward departure.

21           **THE COURT:** Anything you want to respond to on that,  
22 Mr. Getz?

23           **MR. GETZ:** Again, what the Court just heard was a  
24 technical attack on the way that Mr. Brugnara handled his tax  
25 filings. And that is what has brought him before the Court

1 today.

2 He listed all of his corporate entities on his  
3 Schedule K, and he did everything wrong. It was all done  
4 wrong. And it was done with pen and ink, but that is not a  
5 basis to find that his criminal-history category should be  
6 higher.

7 **THE COURT:** All right. Anything more by way of  
8 guideline calculation that the lawyers want to bring up?

9 **MR. NEWMAN:** No, your Honor, not of the guidelines.

10 **MR. GETZ:** No, your Honor.

11 **THE COURT:** All right. Mr. Getz, I need your help on  
12 something. If you just to go back to the \$300,000 point for a  
13 moment, if the -- given that I'm accepting that as the base  
14 offense level, what is the base offense level if you take  
15 300,000?

16 **MR. NEWMAN:** It's 18. And let me show it to you, so  
17 you could --

18 **MS. SEARLES:** That's correct, your Honor.

19 **MR. NEWMAN:** (Indicating)

20 **MR. GETZ:** Yeah.

21 **THE COURT:** All right. So the Court's going to be  
22 thinking about the -- if you want, I will take a break and go  
23 read your memorandum, but I am prepared to tell you that I will  
24 not take into account the bottle-throwing and so forth in that  
25 supplemental, if that's all your other brief dealt with.



1           If you want me to take a break and go find and read  
2 your late memorandum, I will do that.

3           **MR. GETZ:** No. The Court's not going to take it into  
4 consideration. I think that we're prepared to proceed.

5           **THE COURT:** All right. How is my court reporter?  
6 Are you doing all right?

7           **THE REPORTER:** Yes, sir. Thank you.

8           **THE COURT:** So I will -- at this time I will invite  
9 counsel to make your arguments as to what should be the  
10 sentence and just, basically, the statutory sentencing factors.  
11 And then I'll give Mr. Brugnara an opportunity to have the last  
12 word. And then I'll make a decision.

13           Mr. Getz, go ahead.

14           **THE DEFENDANT:** Can I get some water, your Honor?  
15 Could you (indicating) fill this up, please?

16           **THE COURT:** Please, one of the marshals --  
17 Mr. Brugnara needs some water.

18           Mr. Getz.

19           **MR. GETZ:** Yes. Well, as is often done in debates as  
20 well as closing arguments, I'd like to give a few of my minutes  
21 to Mr. Brugnara. So the Court, I hope, will appreciate that my  
22 remarks are somewhat abbreviated, because I'm relying on  
23 Mr. Brugnara to, you know, fill in the gaps regarding the  
24 equitable argument that I'm going to make. And it's simply  
25 this.

1           Twenty-five months is adequate for what Mr. Brugnara  
2 has done. A sentence exceeding 25 months would not fit the  
3 crime. The punishment should fit the crime, and I think the  
4 Court can consider this.

5           The punishment is analyzed from the viewpoint of the  
6 one receiving it. And in that regard, the higher someone goes,  
7 the harder the fall. I think for some people, to get two days  
8 in prison would be a heavy penalty; and Mr. Brugnara is one of  
9 those. Two days is a lot to him. And he's already spent more  
10 than two months in custody.

11           Twenty-five months will address a concerns that the  
12 Court has about punishment standing as an example to those who  
13 run afoul of the tax laws.

14           Twenty-five months is adequate time for Mr. Brugnara  
15 to think about what happened, and come to grips with the  
16 reality of this case.

17           Twenty-five months is enough time for Mr. Brugnara to  
18 make a comeback. He's been successful before. He's got a  
19 great future. He's got people around him; not just his family.  
20 He's got people in the business community, many of whom are  
21 here, who'll support him when he comes back to us.

22           If the Court gives him 25 months in prison under  
23 those circumstances, Mr. Brugnara will be in prison for at  
24 least a year and a half. He will be away from his family. He  
25 will be away from his business interests. And he will have

1 time to think about and ponder how he can do better when he  
2 comes back.

3 He's got a great future. He's got a limitless  
4 future. He's got plenty of time ahead of him to achieve his  
5 goals. And I'd ask the Court to limit the penalty to 25  
6 months.

7 **THE COURT:** All right. Let's hear from the  
8 Government.

9 **MR. NEWMAN:** Your Honor, I think the most serious  
10 point to consider in this case is that 3553(a) factor; is the  
11 defendant's respect for the law. And I would say that he's  
12 shown during the course of his case that he doesn't have any.  
13 He's given the Court misleading if not outright false  
14 information. And this has been going on since at least the  
15 early '90s; that he was part of an incident in the early '90s  
16 where his real-estate license was revoked. And at least the  
17 allegation was that he helped prepare false tax returns. And  
18 the person that was trying to get a loan with him, as the  
19 broker, wasn't allowed to.

20 And there is a detailed decision about -- it was  
21 essentially absolving -- I don't know if I would go that far --  
22 Mr. Brugnara as being the one responsible for preparing the  
23 return; but most certainly you should be aware of the incident  
24 where a tax return that goes to a lender should be the same as  
25 the one that goes to the IRS. And that was in 1990; 1993 when

1 that decision came out.

2           Since that time, this investigation has uncovered  
3 four or five corporate tax returns that I have in my hand that  
4 the defendant has never filed with the IRS. He's never filed  
5 them. And he's given them to lenders, reporting positive  
6 income. And he never filed a tax return with the IRS ever  
7 reporting positive income. He testified, "I had to file  
8 corporate returns," but he never asked -- we're getting  
9 arguments that it's a technicality that the way that he files  
10 is he doesn't file corporate returns; he makes an attachment to  
11 his 1040.

12           Well, I have his corporate returns in my hand that he  
13 gave to lenders. In 1996 he gave 1040s to  
14 Fremont Investment and Loan. The one he gave to them, he made  
15 a half a million dollars. The one he filed with the IRS, he  
16 made negative 142. And there's other instances of the same  
17 conduct.

18           We have forged documents that were given to lenders;  
19 misleading documents. And this went all the way up until the  
20 bankruptcy case that was pending during the course of this  
21 trial, of testifying under oath that your Honor gave him  
22 permission not to file tax returns, explicitly using the Court  
23 name, when, in fact, that wasn't at all true. That -- no one  
24 here -- and there was no order by this Court allowing the  
25 defendant not to file tax returns, so that its entities can

1 proceed in bankruptcy.

2 For that reason -- and I understand the Court's  
3 reason/rationale for using a \$300,000 tax-loss amount, but I  
4 would urge the Court to still use a higher guideline range and  
5 enter a sentence of 46 months, which is the high end of  
6 Level 20. It would correspond to the adjustment that the Court  
7 has already made, because I think there is ongoing, continuous  
8 conduct that is both typical white-collar fraud the defendant  
9 will never admit to. He has no respect for the Court, no  
10 respect for any federal law, and no respect for state law.

11 I thought that it was shocking to see that sealed  
12 transcript, where the defendant was told an indictment that may  
13 not be filed in that case that was pending before  
14 Judge Chesney, if he just took the dam down, and he didn't.  
15 And charges followed.

16 It doesn't matter what the law says, what the Court  
17 orders say. It's clear that the defendant is calling himself  
18 for a severe punishment, because he has no respect for the  
19 judicial system at all, or federal laws.

20 And I would ask your Honor, if the Court is going to  
21 adjust the guideline level, that we also adjust the penalty  
22 level, too; the fine.

23 **THE COURT:** Tell me this. The 300,000 offense level  
24 -- did you say that was 18, or 16?

25 **MR. NEWMAN:** Eighteen.

1           **THE COURT:** All right.

2           **MR. NEWMAN:** And that it would be adjusted up to 20  
3 for the obstruction -- I would ask for that. Whether the Court  
4 accepts the obstruction or not, I think that's adequate basis  
5 for a departure. That PSR has put the defendant on notice that  
6 a departure is maybe warranted. And I think that one is  
7 warranted, whether or not the Court gets them adjustment for  
8 acceptance or not for -- or for instruction, I think that 46  
9 months is an appropriate sentence.

10          **THE COURT:** All right.

11          **THE DEFENDANT:** Thank you.

12               For starters, your Honor --

13          **THE COURT:** Your turn. Go ahead, Mr. Brugnara.

14          **THE DEFENDANT:** -- in the spirit of the  
15 bottle-throwing joke --

16               Can I get more than a sip this time (indicating), so  
17 that I don't -- could I have a full glass of water?

18          **THE COURT:** How about a third of a glass of water?

19          **THE DEFENDANT:** I want a third of a glass this time.

20               You know, your Honor, I want to start off, because to  
21 me, my name is everything. To me, my family's the most  
22 important, and my reputation.

23               And, you know, it's kind of funny, because all of  
24 these accusations dating back all of these years -- file the  
25 charges. They don't file charges, because it's all hearsay.

1 People have investigated me, your Honor, for 20 years. They  
2 don't like a guy who's up and coming, successful.

3 Let's go back. For starters, I definitely want you  
4 to read the supplemental memorandums that were filed this last  
5 week. There were two of them, in addition to Brian Getz'  
6 response. I definitely want you to read those, because it  
7 details detailed explanations about these supposed incidents.

8 Let's start with the '91 incident. I was never  
9 involved in anyone's fraud. I was out of school a couple of  
10 months. And it was some woman and her son-in-law who did some  
11 deal on seven properties. I was barely out of San Diego State  
12 a few months. And I was only -- had my license suspended for  
13 30 days because I asked for the broker's fee. That's in the  
14 supplemental memorandum. This is the sort of ugly lies.

15 They can't talk about my current business. I've done  
16 \$800 million of deals, which is nearly a billion dollars. And  
17 they want to talk about something from 20 years ago.

18 Hey, let's talk about it. I don't back down from it.  
19 Let's talk about '94. I just told you I have Fremont  
20 Investment. Thank God the correct return that Judge Haynes  
21 ruled was, in fact, accurate -- I didn't owe anything. They  
22 got a draft return before that.

23 What happens when you prepare your returns,  
24 your Honor -- a very simple explanation. Lenders need returns  
25 for their files. If you don't have them done yet they say,

1 "Well, give me your draft return." That's what they tell me.

2 I do it. I give it to them. There's a Form 4506 --  
3 I think it is -- where they can send in to the IRS, and get a  
4 copy of your form.

5 There's no shenanigans. They want to paint  
6 Luke Brugnara. They feel so inadequate about themselves. And  
7 they say, "This guy's so successful, he must have done  
8 something illegal." So that's how people feel about me: I  
9 must have done something illegal, because he can't do that on  
10 his own. I have done it on my own. The proof is the lenders  
11 that support me and the volume of deals that I have done.

12 So they pull up this '91 -- this '94 incident. This  
13 guy must threaten people. I haven't threatened anything. The  
14 rigs person was a drifter. Three different men try to shake me  
15 down on a false paternity claim. Refused to take a blood test,  
16 your Honor. I had to spend \$40,000 to get her to take a blood  
17 test with this kid to prove that the kid wasn't mine. It was a  
18 shakedown. I was a victim.

19 Regarding these tax returns, early 2000, that were  
20 given to the lenders that they don't have yet -- the lenders  
21 required them. I can't file these, because I'm in this --  
22 these actions. You know, it was a civil, then a criminal  
23 action.

24 They said, "Fine. Send us what you have; what you're  
25 going to file."



1 All of these lenders funded the loans. All of them  
2 were paid back in full. There was a broker of record on every  
3 loan. Every lender was paid back every penny, and is fully  
4 aware of my circumstances. And if they want to go to trial,  
5 like I begged you four, we're going to have a three-week trial.  
6 And I will have every single lender come up here and on that  
7 stand and say, "Yeah, that's what happened."

8 They like to do it that way: Torture me into a  
9 guilty plea. And let's throw a bunch of dirt on him from 15,  
10 20 years ago. Looks like an idiot in his clown suit.

11 One sip of water. I asked for four glass of water.  
12 They gave me a half a sip each time.

13 Same thing. Took my pen away, so I couldn't take  
14 notes while they were talking.

15 It's the system. Here I am, caught up in it. I  
16 can't beat one thing.

17 I did say that was true at the time sentencing at the  
18 guilty plea. I can't beat these guys. I can beat anyone in  
19 business, because I play fair, but I can't beat somebody who's  
20 going to stick me in a cement box with nine murderers. Can't  
21 do it.

22 So what I want to ask you for, your Honor, is mercy  
23 today, because you're going to -- you made a ruling that I'm  
24 guilty. You're moving ahead to sentencing. I respect your  
25 decision today. Even though I don't agree with it, I respect

1 it, because this is your court.

2 **THE COURT:** Thank you.

3 All right. Mr. Getz, would you hand me --

4 **THE DEFENDANT:** No. I want to say, your Honor --

5 **THE COURT:** You're not done?

6 **THE DEFENDANT:** -- about -- about -- I'd like to get  
7 something from my mother, if I can.

8 **MR. GETZ:** No, no, no.

9 **THE DEFENDANT:** A picture. Please, your Honor.

10 **THE COURT:** The marshals won't let you do that.

11 **THE DEFENDANT:** It's a -- this is my allocution.

12 Please, Mr. Getz. Please. I'm a family man, your Honor. Four  
13 children: Luke, Vincent, Loren, and Brianna. They're in first  
14 grade through eighth grade. I wanted to show you their  
15 pictures. I would never bring them in court, your Honor, out  
16 of respect for them, first, and out of respect for you. It's  
17 inappropriate.

18 I have four children, and I dedicate my life to them.  
19 I spend a considerable amount of time with them. I always put  
20 them before my business. That's why I think, in a way, that  
21 I've been successful in business: Because I've never really  
22 valued money as much as my family.

23 So I take in, you know, risks, and leveraging  
24 properties, and buying other properties because, you know,  
25 irrespective of whether those properties made money or lost, at

1 the end of day I have my family. And that's the only thing  
2 that supports me.

3 They try to paint a picture that I live flamboyantly.  
4 My wife drives the same car since 2001. It's a Chevy Suburban,  
5 for the last nine years. If we were living flamboyantly, we  
6 we'd get a new car every year. We go to the park. I coach  
7 their baseball team, you know.

8 You know, my dad -- he worked at Juvenile Hall for 35  
9 years. My uncle was chief of police. You know, my brother  
10 works as a -- I'm a law-abiding, good guy who's a family man  
11 who happened into business.

12 I never even really expected to get to where I'm at  
13 in business. It was two benefactors -- Harry Blumenthal and  
14 David Pick took a liking to me right after I graduated from  
15 college, and lent me a lot of money to buy properties. They  
16 were getting large returns. That's, in fact, why there are no  
17 taxes to deal with: Because, in fact, you know, there were  
18 such high interest rates paid to these lenders; but I had  
19 enough to live comfortably with my wife and children. That's  
20 really the only thing important to me. The only thing that's  
21 been important to me.

22 I can't tell you how many deals were actually cut  
23 sitting on the grass at a playground, but -- so I probably --  
24 you know, half a dozen or more, because my children are the  
25 most important thing to me; but you know, your Honor, in this

1 case I was thinking about -- I've sat in your room several  
2 times. And -- about what's fair, and what's a fair sentence  
3 for me, you know, considering what you're doing today.

4           You know, you know, I don't think it's fair to use my  
5 success in the past as a businessman. And again, I don't think  
6 that makes me any better or any worse than a plumber or someone  
7 working at a fast food. We're all the same; but for somebody  
8 to treat me differently because I work so hard, and I was  
9 fortunate to get to the level of business where I'm at, as a  
10 way to deter the public or to use, you know, my name and my  
11 notoriety as way to try to advance their own personal careers  
12 and personal agendas -- all of these attorneys, you know, want  
13 to work for MoFo or a major firm, you know, after they put in  
14 their time for the Government. So they want to take down the  
15 elephant; the big gorilla. They want to use that.

16           You know, I was in this court. There was, you know,  
17 an Asian fellow in here. And John Runfola was representing  
18 him. And this guy stole \$175,000 from Wells Fargo and, with  
19 his cousin as a teller, from a little old lady. And the guy  
20 got four months. And I said, "Wow." I mean, four months for a  
21 guy who stole \$175,000 from Wells Fargo Bank, using fake I.D.s,  
22 from a little old lady's bank account?

23           If you use that as a measure of what's fair, in my  
24 case, I should get zero. They want to use me as an example,  
25 which violates my civil liberties and my constitutional rights

1 to be treated fairly. Why didn't they go to the press with  
2 him -- to the *Chronicle* -- and use Luke Brugnara's fame to  
3 advance myself, you know. And that's just not fair. You know,  
4 that's not fair.

5 I mean, listen, your Honor. If you put this in  
6 perspective, this is a -- less than 1 percent. It's actually  
7 1/10 of 1 percent IRS spreadsheet. I'm not going to talk about  
8 my spreadsheet, because it's out the window. IRS spreadsheet.  
9 It's a 1/10 of 1 percent tax-loss case. Okay?

10 And if you put that in perspective to any other  
11 citizen in this country, it's like essentially asking for a  
12 principal term of a teacher who makes 40,000 a year who erred,  
13 you know, a \$100 on her tax return ten years ago, or the  
14 plumber with four children, like my dad. My dad worked hard.  
15 He may have 50,000 -- whatever -- \$60,000 a year. It would be  
16 like going after my dad for a tax return ten years earlier that  
17 he was off by \$200: 1 percent of income from ten years ago.

18 In my opinion -- and I know you're a mathematics --  
19 mathematician -- intent to violation is relative to percentage,  
20 not the numerical amount due. I believe that the severity of  
21 violation correlates to the percentage of error, which shows  
22 either intent or a reasonable contingency.

23 For example, a \$1 million or less error on a hundred  
24 million is certainly less severe than someone who only makes a  
25 million and owes a half a million, even though the half a

1 million is a much lower figure, because it shows intentionality  
2 versus contingency.

3 And in my case, you know, he talked about how I  
4 didn't carry the loss carryforward. Your Honor, he has to talk  
5 about, you know, my malicious intent.

6 The fact that I didn't carry the loss carryforward  
7 shows, in fact, that I didn't have malicious intent. I didn't  
8 even carry forward the \$5 million that I was able to carry  
9 forward. I didn't even carry back the \$3 million that he was  
10 able to carry back. If I was looking to drive a number down, I  
11 would certainly take advantage of any opportunity to lower that  
12 number.

13 Your Honor, regarding the guideline ranges, you know,  
14 those guidelines ranges, you know, your Honor, are just  
15 advisory -- what I've been told by my three attorneys -- and  
16 that you have the full authority to give me whatever you think  
17 is fair and appropriate.

18 You even said, "I can give you zero if I want, or  
19 more." You know, whatever. I'm standing in front of you  
20 today, your Honor. I wanted to, you know -- to fire Brian  
21 right here, because I don't want -- I don't think -- I don't  
22 want to go to jail anymore. I don't want to go to prison. My  
23 children suffer; have suffered every single day for the last  
24 three months. I've suffered immeasurably. I mean, I didn't  
25 think I could make it in there two days, let alone three

1 months.

2           You know, the previous U.S. Attorney, Kevin Ryan, who  
3 was very well respected, refused to prosecute this case as a  
4 criminal case.

5           Tom Newman talks about how I thumb my nose at the law  
6 because I didn't take down a dam. Your Honor, the dam on the  
7 Gilroy property was built by a U.S. Senator, Henry Miller, in  
8 the 1870s. And it was the last grandfathered dam in northern  
9 California. Out of respect for the fact that it was a legal  
10 dam, I didn't -- I did not take it down.

11           Harris Taback, prior counsel, told the U.S. Attorney,  
12 "If you could prove that that dam is illegal, we'll certainly  
13 take it down," because I do follow the law. I said, "Show me  
14 that it's an illegal dam, and we will take it down." It's not  
15 an illegal dam. It's registered with the State of California,  
16 and has been for 140 years.

17           So the guidelines are in your discretion. Whereas  
18 you can give John Runfola's client four months for robbing a  
19 bank and forging a little old lady's I.D. and stealing \$170,000  
20 from her bank account and getting caught, I can't believe my  
21 crime that you've ruled upon today is more serious than that;  
22 but then again, he's unknown. And Tom Newman can't advance.  
23 Tom Newman can't get a job at MoFo, bringing this immigrant  
24 from the Orient to MoFo, and say, "Hey, look. I got this guy,  
25 you know. Four years. Look what he did to this little old

1 lady."

2           So what they're doing is they have their own personal  
3 agenda to use my name. They should be ashamed. If this was in  
4 the business world, your Honor, and someone said -- you've got  
5 to remember the amount of the tax-court case was for  
6 \$11 million. And this case was for \$17.5 million. Let's look  
7 at it.

8           For the last 15 years, 1991 all the way through the  
9 end of '04, 15 years, I have been sued by the U.S. Attorneys  
10 and the U.S. tax attorneys collectively for \$28.5 million in  
11 taxes due.

12           The ruling in the U.S. tax court in front of  
13 Judge Haynes was minus \$87,000.

14           The ruling in this case -- it was a couple hundred  
15 thousand dollars, or whatever it is. The number ended up being  
16 collectively in the hundreds of thousands of dollars off their  
17 claim of \$28.5 million.

18           What would happen at MoFo if someone were to sue  
19 someone for \$28.5 million, and they said, "Oh, well. It's only  
20 a couple thousand dollars." They would be shown the door, man.  
21 They would have a serious problem.

22           What they want you to do is clean up their mess.  
23 What they want you to do is to say, Hey, we were right. No.  
24 Kevin Ryan was right. Kevin Ryan was right. He said, "No,  
25 this is not a criminal case"; but no, no, no. They have the



1 personal agenda. And they went ahead with it. They went to  
2 all of the newspapers said, "This guy. 17 and a half million."  
3 They want you to stick it to me, so you can save them in this  
4 case, so you can prove they were right.

5           You know what you said. I was wrong.

6           Okay. I accepted your decision, because your Honor,  
7 I respect your court, and I respect you. I really do. I think  
8 you have a lot of integrity. I've always liked you, you know.

9           Your Honor, they're wrong, too. They come in with  
10 unclean hands here, because they made all sort of accusations  
11 that were so wildly off base; more than 90 percent off base.  
12 That's a disgrace to your court and to their profession, A, and  
13 to their job. That's a disgrace on their backs.

14           So they want to somehow sweep away, because that's  
15 what people do. I've noticed this, your Honor. I'm at a point  
16 where I don't even like this. People who make mistakes, they  
17 hide their mistakes, so they look to get out of their mistakes.  
18 That's what they're trying to do here to me. They're trying to  
19 use my name, you know.

20           Your Honor, the only thing that matters to me are my  
21 children. I wish you could see their pictures. They're  
22 beautiful children. I was looking forward to one call a day to  
23 them, and then they moved me into solitary confinement. I  
24 didn't have so much as the one write-up. For the last three  
25 months I've been sitting in this jail. They stuck me in some

1 solitary confinement for no reason, your Honor. I can't even  
2 talk to my children anymore. I'm a good father. We go to the  
3 museum. I try to teach them about art. I try to teach them  
4 about -- you know, we always walk through Golden Gate Park  
5 every Sunday. These children are just being destroyed. They  
6 don't even know why. They don't even know why this is -- this  
7 happening. This is six years old to 14 years old.

8 I'm using an accountant now on every tax return. I  
9 promise you, you'll never hear the name Luke Brugnara as it  
10 relates to taxes ever, because an accountant who was also an  
11 attorney is doing all of my taxes.

12 So what benefit comes from punishment of me at this  
13 point? I don't think anything, your Honor.

14 I mean, trust me. I've gone through self-analysis,  
15 sitting with myself for the last three months. I believe that  
16 I'm a better person at the end of this, and have put in  
17 perspective, even more importantly, how important my family is  
18 to me. And, quite frankly, that's all that matters to me.

19 And, you know, your Honor, giving me more time would  
20 just destroy my children. It will destroy my family unit. And  
21 I think that's what makes this great country of ours so  
22 special, is how strong the family units are; how strong and  
23 important it is to have a family stay together. You know, my  
24 son's 14 years. Ordinarily, one of them -- he needs me with  
25 him. He -- I helped them with their homework, your Honor,

1 every night, with their algebra, prealgebra.

2           This isn't like when you were younger, I was younger.  
3 They get two, three hours of homework a night. I took a great  
4 deal of effort helping my children. They all get straight A's.  
5 They need me. They're just hurting so bad, your Honor. I miss  
6 them. And whatever you give me, you know, I am changed from  
7 this case. And I promise you that.

8           And I promised Tom Newman I am changed from this  
9 case, to the point where, you know -- you know, there can't be  
10 any contingency factors, not even 1/10 of 1 percent, if you're  
11 going to deal with the U.S. Government. You can't give even  
12 the needle of an eye [sic], especially if, you know -- if  
13 you're at a higher level, you just can't do it. And that's  
14 what I have learned.

15           And if I pass on any message to my sons, that's what  
16 I'll tell them. Man, don't even have a hair's breadth of error  
17 when it comes to the government, because they will go after  
18 you. Your Honor, I didn't have that, because, like I said, my  
19 father worked for the Juvenile Hall for 35 years; never missed  
20 a day of work.

21           And I was kind of like on-the-job training, your  
22 Honor. As I went through buying these buildings, the market  
23 was improving. And, you know, I was being lent these funds.  
24 And, you know, the mistakes that were made on those returns  
25 will never happen again.

1           And I have that knowledge to pass on to my children;  
2 but you know at this point, your Honor, I mean, I am beaten  
3 down. I mean, you can see I've lost 50 pounds, man, in the  
4 last three months. I don't think I've slept once, you know,  
5 more than an hour at a time sitting in this jail.

6           So I just pray to you that you look at my case, and  
7 look at it not in the context of anything other than just a  
8 regular American, just like these Oriental guys or anyone else  
9 or the teacher or the plumber who basically are in front of  
10 you. And don't treat me any differently. You know, treat me  
11 as the guy who was off by 1/10 of 1 percent ten years ago. Ten  
12 years ago.

13           There's no indictment, your Honor. Two years ago,  
14 three years ago, four years ago -- ten years ago, I was off by  
15 1/10 of 1 percent. Please, you know, show mercy and let my  
16 family be together. That's what I pray to you.

17           **THE COURT:** Thank you.

18           Mr. Getz. I'd like if you can hand up to me the  
19 memorandum that your client wants me to read. And we'll take a  
20 recess. I'll go read it now -- or if you will help me identify  
21 them to make sure that I have them, which I think I have, I  
22 would be happy to go take a look at them.

23           I will hand down to you the ones I already have,  
24 which are three.

25           **MR. GETZ:** I can.

1           **THE DEFENDANT:** No, no, no.

2           **THE COURT:** You tell me if I already have the ones  
3 that you've been talking about. Let me -- can I hand these  
4 down to you?

5           **MR. GETZ:** Thank you.

6           **THE COURT:** And those are the three that I already  
7 have, but you got me nervous that there's something that I  
8 haven't read.

9           **MR. GETZ:** All right. I can hand up what the Court  
10 has not shown us.

11          **THE DEFENDANT:** Excuse me. Let me make sure.

12          **MR. GETZ:** The Court has considered the sentencing  
13 memorandum and the amended status of sentencing. And then last  
14 Friday was this response which the Court said it had not  
15 received, but the issue is moot because the Court said it would  
16 not consider the soccer episode.

17          **THE COURT:** All right. Well, then, can you hand me  
18 those three back? But is there anything else I have not read?

19               (Whereupon a document was tendered to the Court)

20          **MR. GETZ:** Yes. I'll hand that up.

21          **THE DEFENDANT:** These, too.

22               (Whereupon a document was tendered to the Court)

23          **THE COURT:** All right. For the record, you have  
24 handed up something called, "Supplemental Sentencing Memorandum  
25 of Defendant Luke Brugnara" --

1           **MR. GETZ:** Yes.

2           **THE COURT:** -- "Defendant Luke Brugnara's Response to  
3 U.S. Sentencing Memo," and "Declaration of Luke Brugnara."

4           All right. I'll go read these three. And we'll  
5 resume in about 20 minutes.

6           **MR. GETZ:** Thank you.

7           (Recess taken from 12:07 p.m. until 12:25 p.m.)

8           **THE COURT:** All right. Let go back to work. Please  
9 be seated.

10          **MR. GETZ:** Mr. Brugnara is present again.

11          **THE COURT:** All right. The defendant is present. I  
12 want to resume now.

13               I'm going to hand back down to you these three  
14 memoranda. These were all filed by Mr. Brugnara himself, as  
15 opposed to through counsel; but after reading them, I relies  
16 that two of the three I had seen before. And I can't account  
17 for why I didn't have it out here. Nonetheless, I now know  
18 what's in all three, so I'm handing those back down.

19          **MR. GETZ:** Thank you.

20          **THE COURT:** And at this point, I'm going to proceed  
21 to pronounce sentence.

22               All right. First, I want to say the Court needs to  
23 calculate the guideline range. This is disputed in this case.

24               The Court will take 300,000 as the agreed-upon loss,  
25 which gets us to Number 18, as opposed to 22.

1           And I should start off by saying that the probation  
2 officer calculated the correct range to be 57 to 71 months, and  
3 recommended 64 months in prison. And that was based on Total  
4 Offense Level 24, Criminal History Category 2.

5           Now I'm going to recalculate this, with a few  
6 adjustments based on today's argument.

7           So the Base Offense Level is 18.

8           Though there is -- the Government says in a short  
9 evidentiary hearing it could prove the original 22 based on a  
10 much higher loss level, the Court will go with the agreed-upon  
11 300,000.

12           With respect to adjustment for obstruction of  
13 justice, this is a close call, but I'm not going to include 2  
14 points for obstruction of justice; but I want to tell you I do  
15 not accept Mr. Getz' argument that somebody of Mr. Brugnara's  
16 personality can be excused on the ground that he must think  
17 that things he's saying are true at the moment he says them,  
18 even though they're demonstrably false. I don't accept that.

19           I just think the way that -- I just think the way  
20 that testimony was worded is slightly ambiguous. And  
21 therefore, I'm not going to impose the 2 points for obstruction  
22 of justice.

23           With respect to acceptance of responsibility, this is  
24 an unusual case. Ordinarily, when somebody pleads guilty, they  
25 get at least -- they get the 2 points for acceptance of

1 responsibility. In this case --

2 Well, let me give the counterexample first. There  
3 are instances where, if somebody goes to trial, nonetheless,  
4 you could -- you could give them some acceptance of  
5 responsibility, on account of there may be some unique issue  
6 that would -- while they were willing to admit the basic facts,  
7 there's a legal issue, for example, over whether or not the  
8 conduct even constitutes a crime. And therefore, the I, even  
9 myself, have, in the past, been lenient, and given acceptance  
10 of responsibility for that circumstance.

11 This is a the exact opposite. Here we have a  
12 situation where Mr. Brugnara has twice pled guilty, but  
13 immediately tried to wiggle out of it, and claim that he does  
14 not accept responsibility, and that, in fact, he is innocent,  
15 and wants a trial. And I have no doubt he's going to appeal,  
16 and go all the way.

17 So this entire record is the exact opposite of  
18 accepting responsibility. It's a long-winded process of  
19 blaming everyone in sight -- everyone: The accountants, the  
20 lawyers, the Government, Mr. Newman -- blaming everyone except  
21 himself for failing to file returns and pay his taxes. So I'm  
22 not going to give the 2 points for acceptance of  
23 responsibility.

24 With respect to the criminal-history category, the  
25 question is whether it should be Number 1 or Number 2. There's



1 no doubt it should be Number 2. It certainly does not  
2 overstate his criminal history. It is a right-on, correct  
3 computation by the probation officer, Ms. Searles.

4 And I want to say that, without getting into the  
5 soccer thing, and ignoring that totally, as I said that I  
6 would, the rest of this record is replete with examples that  
7 would show, if anything, it ought to be higher; that  
8 Mr. Brugnara is a hostile individual who loses his temper  
9 easily and threatens people. So I'm not increasing it to  
10 Number 3, but certainly Number 2 is fair.

11 So the Court finds that 18 roman numeral II is the  
12 right -- is the right -- where this ought to come down. And,  
13 by my math, in looking at the -- that's 30 to 37 months as the  
14 correct range.

15 Now if, hypothetically, the Court had gone down 2  
16 points for acceptance of responsibility, the range would be 24  
17 to 30.

18 Now the correct, in my judgment, sentence --

19 First I want to say I totally accept Mr. Brugnara's  
20 statement that he is a good father; that he loves his family;  
21 and they're going to miss him. No doubt about it. And it  
22 hurts to have to be in this situation where a good father is in  
23 this position. It is not a comfortable situation for the Judge  
24 to be in here; but I have a duty to do what is right under the  
25 law, and that's what I'm going to do.

1           So I have taken that into account, but I also have to  
2 take into account the sentencing factors. There is a -- when  
3 we come to our taxes, there is a huge, huge obligation on all  
4 of our parts to pay our fair share to the United States  
5 Government, and help this country move along, and not to cheat  
6 on our taxes.

7           The Government can't possibly go after everyone who  
8 cheats on their taxes, but it can go after a few, and hold them  
9 up to public example, so that others will see: Aha! I'd  
10 better pay my taxes. I don't want to be caught and have to  
11 serve time, like Mr. Brugnara did.

12           So deterrence is an important factor on this  
13 sentencing decision.

14           Another important factor is to promote respect for  
15 the law. And the Court is convinced that Mr. Brugnara is --  
16 has almost no respect for the law. He violates it over and  
17 again, and then he blames other people, instead of just trying  
18 to make it right. He blames other people.

19           There's an element of being a bully; of making  
20 physical threats. He definitely is a fast talker and a  
21 manipulator. He's someone who refuses to honor his  
22 obligations.

23           So, to promote respect for the law, I think, is an  
24 important factor in these circumstances.

25           So those are the two, I think, of the sentencing

1 factors -- the two that come to mind most readily.

2 Can take him at his word that he won't commit any  
3 more crimes?

4 I've heard that too many times, and I don't quite  
5 believe it in Mr. Brugnara's case. It's -- I treat that factor  
6 as a wash in these circumstances; meaning I discount it, but I  
7 don't know -- I don't know how much weight to put on that.

8 I want to circle back to what the guideline range is.  
9 The guideline range, which is advisory -- and Mr. Brugnara's  
10 right about that. The guideline range is 30 to 37 months.  
11 That's the one that I think does apply; but if acceptance of  
12 responsibility was given, it would be 24 to 30 months.

13 So they overlap at the 30 level. And that's going to  
14 be the sentence: 30 months in prison. Two and a half years.  
15 It's a little more than Mr. Getz argued for, but I think that  
16 is the right sentence in this case.

17 And I want to make it very clear that if I am wrong  
18 about the acceptance of responsibility, then it would still be  
19 a 24 to 30 months. And I would still find and do find that 30  
20 months would be the appropriate sentence in that circumstance.  
21 So either way, 30 months would be the appropriate sentence.

22 All right. I want to say that Ms. Searles is one of  
23 our absolute best probation officers ever. And it is hard for  
24 me to come out with a sentence that is less than half of what  
25 she has recommended; but I've tried to explain the reasons why

1 I have come to that conclusion.

2 Now, I need the help of the Government for a moment.  
3 You said that there should be a reduction in something.

4 **MR. NEWMAN:** I think the fine -- a reduction of fine  
5 amount to fit the level would be appropriate, too, your Honor.

6 **THE COURT:** To what?

7 **MR. NEWMAN:** I would ask for a fine of \$50,000. And  
8 I would add that that's --

9 **THE COURT:** What is the range?

10 **MR. NEWMAN:** The range for an 18 to 19. That would  
11 be with acceptance, your Honor, is 6- to 60,000.

12 **THE COURT:** Is what?

13 **MR. NEWMAN:** 6- to 60,000. That's with acceptance.  
14 Excuse me, your Honor. It's 5,000 to 50,000 with acceptance.

15 Without acceptance, Level 18 is 6,000 to 60,000. I  
16 would ask for 50,000, which is the high end of a Level 16. So  
17 that would, again, as the Court has already imposed sentence,  
18 overlap both an 18 and a 16 guideline range.

19 **THE COURT:** I think the restitution level has got  
20 to -- doesn't that have to be down to 300,000? That's what I  
21 would.

22 **MR. NEWMAN:** It would not, your Honor, because the  
23 restitution amount, the tax loss amount for criminal purposes,  
24 and the guideline amount -- they're never synonymous. So at  
25 the very least, it should be 1.9 million. Specifically, it

1 should be \$1,904,625.35.

2 That may not be the criminal tax loss amount, but it  
3 certainly is the low end of the civil amount due; but if the  
4 Court wants to impose a restitution amount of 300,000, that  
5 would really just be the tax loss amount. I don't think that  
6 that would be appropriate. I think the restitution amount  
7 should be the actual amount due, which is \$1,904,625. And that  
8 would be the lowest, most conservative figure for the civil tax  
9 due.

10 **THE COURT:** Say that number again.

11 **MR. NEWMAN:** \$1,904,625.35.

12 **THE COURT:** All right. What do you say to that,  
13 Mr. Getz?

14 **MR. GETZ:** The numbers mathematically are correct,  
15 but missing from the equation -- and what I think the Court  
16 should consider -- is ability to pay. And I'm not aware that  
17 Mr. Brugnara has money.

18 So, based upon my --

19 **THE COURT:** You said \$800 million that he's borrowed  
20 in the past, and paid back. I believe that he will have money  
21 in the future. So I'm going to go with the 1.9 million that  
22 the Government has offered up.

23 All right. Please listen as the Court pronounces the  
24 sentence. And then at the end, I'll ask you whether or not the  
25 form of the judgment should not be entered as stated.

1 Pursuant to the Sentencing Reform Act of 1984, it is  
2 the judgment of the Court that Luke D. Brugnara is hereby  
3 committed to the custody of the Bureau of Prisons for a term of  
4 30 months. This term consists of terms of 30 months on Counts  
5 1, 2, and 3, all to be served concurrently.

6 Upon release from imprisonment, he shall be placed on  
7 supervised release for a term of one year. This term consists  
8 of one year on each of Counts 1, 2, and 3, all to be  
9 concurrent.

10 Within 72 hours of release from the custody of the  
11 Bureau of Prisons, he shall report in person to the probation  
12 office in the district to which he is released. While on  
13 supervised release, he shall commit no more crimes; shall  
14 comply with the standard conditions adopted by the Court; shall  
15 refrain from any unlawful use of a controlled substance; and  
16 submit to a drug test within 15 days of release on supervised  
17 release, and to periodic drug tests thereafter, and comply with  
18 the additional conditions.

19 One, pay all restitution, fines, special assessments  
20 imposed by the judgment that remain unpaid at the commencement  
21 of supervised release.

22 Two, provide probation with access to financial  
23 information as requested; authorize Probation to do credit  
24 checks and obtain copies of income tax returns.

25 Next, defendant shall comply and coöperate with IRS

1 in a good-faith effort to pay any outstanding tax liability, to  
2 include penalty and interest.

3 Next, provide U.S. Probation with a copy of any  
4 written and approved agreement with the IRS for the payment of  
5 any outstanding tax liability, to include penalty and interest,  
6 within ten days of execution of such agreement.

7 Next, defendant shall timely and accurately file all  
8 future income tax returns required by law during the term of  
9 supervision, unless an extension granted by IRS.

10 Next, no firearms, no ammunition, no destructive  
11 devices, no other dangerous weapons, and never be present in a  
12 vehicle where any such thing is present.

13 Next, coöperating in the collection of DNA, as  
14 directed by Probation.

15 Next, unless directed in writing otherwise, check  
16 voice mail and/or answering machine daily, and follow all  
17 instructions left by Probation.

18 Next, defendant shall pay to U.S.A. a special  
19 assessment of \$300, due now. This can be worked off through  
20 the Inmate Responsibility Program.

21 Next, pay to the U.S. a total fine of \$50,000. The  
22 fine consists of \$50,000 on Counts 1 through 3, all due now;  
23 all concurrent. While incarcerated, this can be worked off  
24 through the Inmate Responsibility Program.

25 It is further ordered that the defendant pay to the

1 IRS, 450 Golden Gate Avenue, the amount of \$1,904,625, which is  
2 due now. While incarcerated, payment of restitution can be  
3 worked off at the rate of \$25 per quarter through Inmate  
4 Responsibility Program.

5           Upon release from custody, restitution payments shall  
6 be made to the Clerk of the Court, 450 Golden Gate Avenue, at  
7 the rate of \$10,000 per month.

8           Any reason why the form of judgment should not be  
9 entered as stated?

10           **MR. NEWMAN:** No, your Honor.

11           **MR. GETZ:** No not as to the form.

12           **THE COURT:** All right. The judgment will be entered,  
13 probably today or tomorrow.

14           And, Mr. Brugnara, you have ten days within which to  
15 file a notice of appeal, in case you want to do that. And so I  
16 give you that advisement so that you won't let the time slip  
17 by, and you'll make sure that you cover that base if you do  
18 want to appeal.

19           Are we done for today?

20           **MR. GETZ:** We are not.

21           There are two matters -- at least two matters that I  
22 would like to address with the Court, if I may.

23           **THE COURT:** Sure. Go ahead.

24           **MR. GETZ:** The first is the issue of self-surrender.

25           It was bargained for in the very written plea bargain



1 that the Court relied upon to sentence Mr. Brugnara moments  
2 ago. It's written in there that the Government would not  
3 object to a self-surrender.

4 As I mentioned in my sentencing memorandum, I'm  
5 holding the Government to their part of the bargain. So the  
6 question is, more poignantly, whether the Court would consider  
7 Mr. Brugnara a fit candidate for self-surrender. And I have,  
8 essentially, three brief points to make in that regard.

9 The first is there isn't anyone that's ever come  
10 before the Court that has more community ties that  
11 Mr. Brugnara. He is from San Francisco and has lived here his  
12 entire life. His wife is here today. His mother lives here.  
13 And his four children live here. So that is the first point.

14 The second thing is: He's not a flight risk,  
15 because, were he to flee, he would never see his children  
16 again. So that's not even worth any consideration.

17 The third thing is: He's been convicted of a  
18 tax-fraud case. And that is not the kind of case that should  
19 result in incarceration rather than self-surrender.

20 I would also mention in connection with that, that it  
21 is well known that those who self-surrender obtain significant  
22 benefit in terms of their calculation, both as to placement in  
23 the security system maintained by the federal penitentiary, but  
24 also in the amount of time they serve, so that the defendant  
25 who self-surrenders is given a lower security category, and can

1 maintain placement in a camp, rather than a medium- or maximum  
2 security, and that inmate will serve less time. Because of the  
3 way credits are calculated, the inmate receives less time.  
4 And, as a "first offender," if I can use that term -- and I  
5 do -- I think Mr. Brugnara deserves that.

6           So I'm asking that the Court to permit  
7 self-surrender. He will surrender when he's designated by the  
8 Bureau of Prisons. And I'm asking that the Court make its  
9 advisory recommendation to the Bureau of Prisons. And this is  
10 the second thing -- that he be -- that the Court make the  
11 advisory recommendation that he be housed at Lompoc Camp.

12           **THE COURT:** Well, the second part I'm willing to do.

13           All right. Let's hear argument on the first part.

14           **MR. NEWMAN:** Well, this is a very difficult position  
15 for me to be in, because, your Honor, that's true in the plea  
16 application that the Government would make a recommendation  
17 that that defendant could self-surrender; but at the same time,  
18 this case has groan exponentially over the years. And, while I  
19 wouldn't have a problem making that recommendation, I have a  
20 hard time doing it now, with the caveat that we're putting the  
21 cart before the horse. The defendant really needs to show that  
22 he should be able to get out.

23           And there's clear evidence that he's a danger to the  
24 community in several respects. And it's problematic knowing  
25 that he's supplied the Court with misleading information just

1 to get out of custody. He did to Judge Spero. And this had  
2 been going on for nearly a year.

3 **THE COURT:** What evidence is there he's a danger to  
4 the community?

5 **MR. NEWMAN:** An economic danger.

6 And the information that's in the presentence report  
7 that other people were threatened is not so much as related to  
8 this case, but in other cases. And that -- I guess I have a  
9 general concern as to what will happen with this case if  
10 there's an attempt to contact or influence witnesses; but I  
11 don't think that this decision could be made kind of on the fly  
12 right now about whether or not he should be released today. I  
13 understand that was in the application, but at the same time, I  
14 think that this should be something that's thought through a  
15 little more than just this argument.

16 I mean, the presentence report itself takes these  
17 threat allegations as they relate to physical threats very  
18 seriously. I would say that --

19 **THE COURT:** Who could he threaten that's connected  
20 with our case?

21 **MR. NEWMAN:** He knows at the very least who the  
22 people are that would be witnesses in the case, and would  
23 attempt to contact them.

24 And there's evidence that I have -- I put this before  
25 the Court two years ago, nearly -- is that he shouldn't be

1 allowed to contact anyone outside of the presence of counsel.  
2 If there's an appeal or anything of that sort, I have that  
3 concern. And that's something that I'm raising now; not to say  
4 that he should be in custody, but I have a concern that he just  
5 gets let out today, without thinking this through in careful  
6 terms of release pending his self-surrender, if that's even the  
7 case; but I don't think that this is something that can be  
8 decided today.

9 **MR. GETZ:** If I may briefly respond to that. And,  
10 without repeating what I said before in this regard, I have two  
11 new things to say.

12 One is I think the Government's barred from making  
13 the argument under Rule 11 that the Court can't release him  
14 today. I think they're barred by the plea agreement. And  
15 your Honor sentenced him on that written plea agreement. And  
16 I'm standing right here, looking at it.

17 **THE COURT:** Hand that up to me, please.

18 **MR. NEWMAN:** I'm not sure I agree with that. It's a  
19 recommendation that he self-surrender.

20 **THE COURT:** I don't see anything. This is  
21 handwritten.

22 **MR. GETZ:** Yes. That was the plea agreement in which  
23 the Government agreed that it would not oppose voluntary  
24 surrender. And that plea agreement's the one that the Court  
25 relied upon to sentence Mr. Brugnara.

1           **THE COURT:** That's true. It does say that.

2           I hand this back (indicating).

3           **MR. GETZ:** So I'm making a narrow procedural argument  
4 that the Government is barred from making the argument that the  
5 Court just heard, but in addition, I have a point having to do  
6 with the Government's admission of this psychiatric evaluation  
7 by Dr. Kessler, which doesn't saying anything about  
8 Mr. Brugnara being a danger or a risk. So I think on that  
9 basis, the Government's barred from making any argument that he  
10 should not be released for voluntary surrender.

11           Now, the Court may have its own idea about whether or  
12 not Mr. Brugnara should voluntarily surrender. Here's what I  
13 have to say about that. He wouldn't cross the street to avoid  
14 his sentence, because he wants to come back. He's got nothing  
15 if he runs, and he's got no place to run to. So, just looking  
16 at it logically, looking at it equitably -- and all courts are  
17 based on equity -- how can he not be a great candidate for  
18 self-surrender? There's never been anyone better.

19           I'm making that request. In terms of the details how  
20 it would be worked out or so forth, the -- I think the Court  
21 ought to order him released today, with an order to  
22 self-surrender; but if the Court wants some procedural  
23 safeguards built into it, then give us a date before  
24 Magistreate Spero on Wednesday morning to work out the details.  
25 I'll meet and confer with the government today and tomorrow.

1 We'll put something in place. And we'll appear Wednesday in  
2 front of Judge Spero with the blessings from this Court that  
3 Magistreate Spero can release him for self-surrender as he  
4 bargained for.

5 **THE COURT:** Is Judge Spero familiar with this case?

6 **MR. GETZ:** He's very familiar with this case, because  
7 we had five -- we had a bail hearing followed by four motions  
8 for reconsideration. And in the end, he wouldn't release  
9 Mr. Brugnara.

10 **MR. NEWMAN:** I would add, your Honor, we've had six  
11 detention hearings. He's not just being held in one case. So  
12 I --

13 **MR. GETZ:** That's true. He's not being held in one  
14 case, but the other case is also on calendar for proceedings on  
15 Wednesday afternoon at 2:30. So it makes perfect sense to give  
16 us the calendar date Wednesday morning with Magistreate Spero.

17 And I would just like to add, because I forgot about  
18 it until the Government just spoke, but at the last detention  
19 hearing or motion to reconsider, as it were, before  
20 Magistrate Spero, one of the grounds the Government advanced  
21 for denying bail to Mr. Brugnara presentencing was that he  
22 faced a significant prison time.

23 Now, it is true that he faces significant prison  
24 time. And he'll do his time, but the numbers that were being  
25 discussed at the last hearing were 57 to 71. So now we know

1 now we know what the sentence is. The sentence is 30. And  
2 he's eligible for halfway house the last six months. That  
3 makes it 24. He gets 55 days' good time off every year. It's  
4 moving in the right direction. He's not even going to serve  
5 two years on this case. It's going to be somewhere between one  
6 and two years.

7 How is he not a great candidate for self-surrender?

8 **THE COURT:** All right. Here's what we'll do.

9 Put it on Judge Spero's calendar for Wednesday, for  
10 him to do the following: To see if the statutory requirements  
11 for release pending appeal are satisfied; or no -- for release  
12 pending self-surrender -- that's what I mean -- are satisfied,  
13 and on what conditions that can be done.

14 And I move to do this only because the Government  
15 agreed in writing to do it. I'm not, myself, saying that I  
16 would grant such relief. Be clear on that; but I do think that  
17 when the Government makes a representation like this, as it  
18 did, we ought to try to honor that, because I'm sure  
19 Mr. Brugnara relied on it, even though the Government has no  
20 authority to bind the Court.

21 But I have one last thing to say on this, and that  
22 is: Under no circumstances would I support bail pending  
23 appeal.

24 So if that's where this is headed, please, no, no. I  
25 think Mr. Brugnara should start serving his time as soon as

1 he's designated. And I would not want anything in this record  
2 to suggest that I or the Government certainly even that writing  
3 doesn't go that far.

4 And so if circumstances can be -- and conditions  
5 could be worked out with Judge Spero that would satisfy him  
6 that he would not be a danger to the community, would not flee,  
7 will report when he's supposed to, then okay.

8 **MR. NEWMAN:** Well, your Honor, then I guess that's  
9 the point I was trying to make earlier, is that's what  
10 Judge Spero already decided.

11 **THE COURT:** Well, send it back to him now. I think  
12 we all know what the sentence is now, and I'll let him take a  
13 fresh look at it. And if he decides, no, still can't do it,  
14 then that's okay. That's -- so I guess you could appeal.

15 I'm not saying which way it out to come out, but I am  
16 saying that when the Government makes that kind of a  
17 recommendation, and we ought to -- we ought to try to honor  
18 that. And I want to give Mr. Brugnara another opportunity to  
19 do it.

20 I will say one other thing. Mr. Brugnara, if you  
21 were not to report -- let's say that you got it in your mind  
22 that you could decide to give yourself a one-week extension on  
23 when you would report to whatever place they send you. I  
24 believe it would be the new offense called "Escape," if I'm not  
25 mistaken. I'm not sure of that. There is -- it is a crime.



1 And the Judge in that case may not be as lenient as I have been  
2 today. And if it's me, I might not be that lenient as I have  
3 been today.

4 So if you were to be designated to, you know, Fargo,  
5 North Dakota, and they told you to get up there and report on  
6 such-and-such a date, there would be no excuses if that were to  
7 happen; and even if you thought you were going to get bail  
8 pending appeal, no. You have to do it until there's an order  
9 of the Court telling you otherwise.

10 Now, we're not even there yet, because Judge Spero  
11 hasn't looked at this, but -- but I know the way you think,  
12 Mr. Brugnara. And my fear is this; that once you get out, you  
13 will be so inclined to want to stay out that you will invent  
14 fictitious reasons for staying out, and get yourself in huge  
15 trouble.

16 These federal marshals and the FBI will catch you.

17 I had a case -- I had a case where the guy thought no  
18 one was watching. They had five FBI agents tailing him into  
19 the airport. He's serving 71 years right now. So you would  
20 not want to do that, because you -- you would just be digging  
21 the hole deeper.

22 All right. So we'll set it -- but please do not  
23 construe any of this as saying that I think he should be let  
24 out.

25 I'm just saying he ought to be -- Judge Spero should

1 take another look at it, now that we know what the sentence is.

2 All right?

3 **MR. GETZ:** Yes. The Court is saying that it's up to  
4 Magistrate Spero?

5 **THE COURT:** Well, both sides can take an appeal. And  
6 say it's up to him in the first instance. And I don't know  
7 what I would do if there was an appeal to me, but I think  
8 that's what you've asked for, so we're going to -- I'm going to  
9 say, "Fine."

10 **THE DEFENDANT:** I want to make a statement.

11 **THE COURT:** No, no.

12 **THE DEFENDANT:** I respect you, your Honor, and what  
13 you said. I just wanted to let you know I needed the time. I  
14 have four small children. I'm like you. I just want to get  
15 the time over with. I told you I accepted -- we haven't talked  
16 about an appeal. I want to get this sentence over with and get  
17 on with my life. I need time to get my four children and my  
18 wife situated, like any good father and husband, just to  
19 prepare them mentally for what I have to go through; get them  
20 prepared, and then go get this time over and done with; come  
21 out better.

22 **THE COURT:** Well, Mr. Brugnara, that's one of the  
23 things that you've said that I understand, you know. And if I  
24 didn't have all of baggage from all of the other things that  
25 have happened in this case, I would place a hundred percent

1 confidence in that; but you make me nervous, with so many other  
2 things that you've said and done, that I don't know for sure  
3 that I can trust you.

4 But let's see what Judge Spero says. It's a good  
5 reason that you want to -- that you give. So Wednesday  
6 morning, Judge Spero. And, Dawn, can you do that?

7 **THE CLERK:** I can send word to Judge Spero, yes.

8 **THE COURT:** All right.

9 **MR. GETZ:** Thank you.

10 **MR. NEWMAN:** One more thing, your Honor.

11 **THE COURT:** Good luck, Mr. Brugnara.

12 **MR. NEWMAN:** One more thing.

13 **THE COURT:** Wait, wait, wait. There's one more  
14 thing.

15 **MR. NEWMAN:** The Government moves to dismiss Count 4  
16 of the superseding indictment, and Counts 1 through 3 of the  
17 original indictment.

18 **THE COURT:** All right. Mr. Getz, I'm going to grant  
19 the motion to dismiss the other counts.

20 **MR. GETZ:** Yes. We have no objection to that motion.

21 **THE COURT:** All right. That part of your motion is  
22 granted.

23 **MR. NEWMAN:** Thank you, your Honor.

24 (At 1:00 p.m. the proceedings were adjourned)  
25

**CERTIFICATE OF REPORTER**

I, LYDIA ZINN, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in CR. 08-0222 WHA, United States of America v. Luke Brugnara, were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

---

/s/ Lydia Zinn, CSR 9223, RPR

Friday, August 20, 2010